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Recent Developments in Pennsylvania Law

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Cover Page Footnote

The following members contributed to Recent Developments in Pennsylvania Law: Executive Recent Decisions Editor Mary Ann E. Moore; Associate Comment Editor Leilani Medina Costa; Associate Recent Decisions Editor JoErin I. O'Leary, and Senior Staff member David M. Seitz.

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I. Constitutional Law

CONSTITUTIONAL LAW—PUBLIC EDUCATION—School District of Wilkinsburg v. Wilkinsburg Education Ass'n, 667 A.2d 5 (Pa. 1995)—The Pennsylvania Supreme Court held that there may be circumstances when the fundamental right to a thorough and efficient public education demands the subcontracting of teachers.

In March of 1995, the Wilkinsburg Education Association (the "Union") brought suit against the Wilkinsburg School Board (the "Board").[1] The Board wanted to subcontract the operation of Wilkinsburg's Turner Elementary School to Alternative Public Schools, Inc. ("APS"), and the Union sought to prevent the performance of a contract between the parties.[2] The contract was enjoined without an evidentiary hearing.[3] The Board objected and appealed to the Pennsylvania Commonwealth Court.[4] In July of 1995, the commonwealth court affirmed the injunction.[5] In August of 1995, the supreme court granted allocatur and assumed plenary jurisdiction.[6]

The supreme court first addressed the issue of the preliminary injunction.[7] The court held that the injunction was in error because there was insufficient evidence of irreparable harm that the injunction prevented greater harm, or that the public interest would be adversely affected if the injunction was not granted.[8]

As to the merits of the claim, the court held that if the contract between the Board and APS was illegal under the Public School Code, the Public School Code was illegal as applied to the Wilkinsburg School District.[9] Specifically, the court noted that article III, section 14 of the Pennsylvania Constitution requires

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1. School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 667 A.2d 5, 6 (Pa. 1995).
2. *Wilkinsburg*, 667 A.2d at 6.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 7.
7. *Wilkinsburg*, 667 A.2d at 7.
8. *Id.* (citing New Castle Orthopedic Ass'n v. Burns, 392 A.2d 1383 (Pa. 1978)).
9. *Id.* at 8. The opinion did not address the underlying question of the legality of the contract under the Public School Code. *Id.* (citing 24 PA. CONS. STAT. §§ 1-101 to 27-2702 (1984)).

a "thorough and efficient system of public education."[10] Because the circumstances in Wilkinsburg were so severe,[11] the court stated that a prohibition against subcontracting teachers in that district would inhibit the Board's ability to provide students with a "thorough and efficient" education.[12]

The court noted that public education is a fundamental right and that the best interests of the students must always be of primary concern.[13] The court remanded the case for an evidentiary hearing and the preliminary injunction was vacated.[14]

Chief Justice Nix filed a dissenting opinion.[15] He pointed out that the Public School Code explicitly authorizes certain subcontracting, indicating that subcontractors are not authorized without an express provision.[16] Further, the Chief Justice noted that the court failed to establish a persuasive reason for ignoring the underlying question of the legality of the contract under the Public School Code.[17] Finally, Chief Justice Nix concluded that the court's reasoning was "specious and wholly unpersuasive."[18]

The majority correctly stated that education is a fundamental right in Pennsylvania, and that any decision regarding education must be guided by the best interests of the students.[19] The court also outlined various examples of the inexcusable failure to provide Wilkinsburg's students with the "thorough and efficient" education that they are constitutionally guaranteed.[20] From this, the court concluded that it may be constitutionally necessary to subcontract teachers. This logic assumes that subcontracting is in the students' best interest. It seems unlikely that spending less money will better the system. The Wilkinsburg

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10. *Id.* (citing PA. CONST. art. III, § 14).

11. *Id.* The Board alleged that the Wilkinsburg 1992 valedictorian graduated with a 2.667 grade point average. *Id.* In the 1993-1994 school year, only one student scored above the national average on the Scholastic Aptitude Test. *Id.* The fourth, fifth and sixth graders at the Turner School had the worst performance of Allegheny County students on standardized achievement tests in reading, math, language and science. *Id.*

12. *Wilkinsburg*, 667 A.2d at 9 (citing PA. CONST. art. III, § 14).

13. *Id.*

14. *Id.*

15. *Id.* at 10 (Nix, C.J., dissenting).

16. *Id.* at 11 (citing provisions of the Public School Code authorizing the subcontracting of food service programs, educational broadcasts, rehabilitative programs, transportation, programs or tuition reimbursement for exceptional children, health examinations, drug and alcohol programs, accountants, and attorneys).

17. *Wilkinsburg*, 667 A.2d at 11.

18. *Id.* at 12 n.1.

19. *Id.* at 9.

20. *Id.* at 8.

School District does not have enough money to educate its children, and the supreme court has held that it may be constitutionally necessary to spend less.

CONSTITUTIONAL LAW—PUBLIC OFFICERS—HOME RULE—*In re* Reese, 665 A.2d 1162 (Pa. 1995)—The Pennsylvania Supreme Court held that the state constitution specifically prohibits home rule municipalities from recalling elected officials.

Gary Reese ("Reese") was elected mayor of Kingston, Pennsylvania, in November of 1993.[21] Pursuant to the recall provisions of the Kingston Home Rule Charter, the Kingston Citizens for Change filed a petition to have the question of the recall of Reese presented on the May 1995 ballot.[22] The petition was field with the Luzerne County Board of Elections on March 6, 1995.[23]

Reese filed objections with the court of common pleas.[24] On March 29, 1995, the court set aside the petition for recall and ordered the Board of Elections to leave the question of recall off the May ballot on the grounds that the recall provisions of the home rule charter were unconstitutional.[25]

The Kingston Citizens for Change filed an appeal with the Pennsylvania Supreme Court in early April of 1995.[26] The court granted expedited review, and affirmed the court of common pleas in late April of 1995.[27]

The issue addressed by the court was whether article VI, section 7 of the Pennsylvania Constitution regarding the removal of elected public officials applies to all elected officials.[28] If so, the court noted that the removal of elected officials is a power specifically denied to home rule municipalities.[29]

The court began its analysis by stating two guiding principals: first, that the acts of the legislature are presumed valid and that a clear violation of the constitution is required to rebut the presumption; and second, that the authority of a home rule municipality is presumed valid absent a specific constitutional restric-

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21. *In re* Reese, 665 A.2d 1162, 1163 (Pa. 1995).
22. *Reese*, 665 A.2d at 1163.
23. *Id.*
24. *Id.*
25. *Id.* The court's decision was based on Citizens Committee to Recall Rizzo v. Board of Elections, 367 A.2d 232 (Pa. 1976).
26. *Id.*
27. *Reese*, 665 A.2d at 1163. The court had jurisdiction under 42 PA. CONS. STAT. § 722(7) (1991 & Supp. 1995).
28. *Id. See* PA. CONST. art. VI, § 7.
29. *Reese*, 665 A.2d at 1163. *See* PA. CONST. art. IX, § 2.

tion.[30] In spite of these presumptions, the court held that the recall provisions of the home rule charter were unconstitutional.[31]

The court analyzed *Citizens Committee to Recall Rizzo v. Board of Elections*,[32] which involved a petition to recall the Mayor of Philadelphia.[33] The court noted that the *Rizzo* court was unable to develop a majority rationale for its decision that the recall provisions of the Philadelphia Home Rule Charter were unconstitutional.[34]

The court looked to the concurring opinion of Justice (now Chief Justice) Nix, which held that article VI, section 7 of the constitution provides the only means of removing all elected civil officers.[35] Following the *Rizzo* rationale, the court held that the recall provisions exceeded the home rule authority granted by article IX, section 2, because the recall provisions are expressly prohibited by article VI, section 7.[36]

The *Reese* court removed any doubts about such provisions in home rule charters that remained after *Citizens Committee to Recall Rizzo*. The court correctly stated that any provisions in a community's home charter must be consistent with the Pennsylvania Constitution.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—Commonwealth *ex rel.* Juliante v. County of Erie, 657 A.2d 1245 (Pa. 1995)—The Pennsylvania Supreme Court held that attorney's fees may be awarded to the judiciary if it successfully challenges conduct by another branch of government which threatens its autonomy.

In 1985, Erie County challenged an order of the Erie County Court of Common Pleas that appointed Thomas Antolik as Chief Juvenile Probation Officer on the grounds that the appointment violated the county's anti-nepotism policy.[37] The court cited *In*

30. *Reese*, 665 A.2d at 1164 (citing Addison's Case, 122 A.2d 272 (Pa. 1956) and County of Delaware v. Township of Middleton, 511 A.2d 811 (Pa. 1986)).

31. *Id.* at 1167.

32. 367 A.2d 232 (Pa. 1976).

33. *Reese*, 665 A.2d at 1165 (citing *Rizzo*, 367 A.2d at 233-34).

34. *Id.* (citing *Rizzo*, 367 A.2d at 233).

35. *Id.* (citing *Rizzo*, 367 A.2d at 232). *See* Milford Township Supervisor's Removal, 139 A. 623 (Pa. 1927) (holding that the article VI, section 1 provisions for creating elected offices indicate an ability to create methods of removal).

36. *Reese*, 665 A.2d at 1167.

37. Commonwealth *ex rel.* Juliante v. County of Erie, 657 A.2d 1245 (Pa. 1995) (citing *In re* Thomas P. Antolik, 501 A.2d 697 (Pa. Commw. Ct. 1985)).

re Thomas P. Antolik,[38] in which the commonwealth court held that article V of the Pennsylvania Constitution mandates the judiciary's control over the management of court-appointed personnel.[39] Specifically, the court held that the public interest in preventing nepotism, and the presumption that the County's policy would have that desired effect, was less important than the autonomy of the judiciary.[40]

In 1987, the president judge of the Erie County Court of Common Pleas entered an ex parte order requiring the County to pay the court's attorney's fees.[41] The order was appealed to the commonwealth court, where it was vacated and remanded because the court held that the ex parte order violated due process.[42] As a result, the judges filed a complaint in mandamus demanding that the County pay the attorney's fees incurred by the court of common pleas.[43] The trial court granted summary judgment for the County and the Pennsylvania Commonwealth Court affirmed.[44]

On appeal, the supreme court reversed the decision of the commonwealth court and ordered the payment of attorney's fees.[45] To begin its analysis, the court stated that the Erie County judiciary could not recover unless there was either statutory authority or a persuasive reason to create an exception to the general rule that attorney's fees are not recoverable.[46]

Section 3722 of the act governing the financial matters of the judiciary states that county governments shall provide "all necessary accommodations, goods and services" to the court system.[47] The court stated that the phrase "goods and services"

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38. 501 A.2d 697 (Pa. Commw. Ct. 1985).

39. *Juliante*, 657 A.2d at 1247 (citing *Antolik*, 501 A.2d at 700). Article V of the Pennsylvania Constitution provides for a unified judicial system. PA. CONST. art. V.

40. *Juliante*, 657 A.2d at 1247 (citing *Antolik*, 501 A.2d at 700).

41. *Id.* at 1248. A law firm had sent an invoice to the court, and the judges forwarded the bill to the County. *Id.* at 1247. The County refused to pay and the bill was submitted to the Administrative Office of Pennsylvania Courts for review, where it was determined that the County was responsible for the debt. *Id.* at 1247-48. The ex parte order followed. *Id.* at 1248. An ex parte proceeding is "[a]ny judicial or quasi judicial hearing in which only one party is heard as in the case of a temporary restraining order." BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

42. *Juliante*, 657 A.2d at 1248 (citing *In re* Thomas P. Antolik, 555 A.2d 273 (Pa. Commw. Ct. 1989)).

43. *Id.* at 1248. A complaint in mandamus is "the name of a writ (formerly a high prerogative writ) which issues from a court of superior jurisdiction, and is directed to . . . an inferior court, commanding the performance of a particular act therein specified." BLACK'S LAW DICTIONARY 961 (6th ed. 1990).

44. *Juliante*, 657 A.2d at 1248-49.

45. *Id.* at 1252.

46. *Id.* at 1249.

47. 42 PA. CONS. STAT. § 3722 (1981). Section 3722 specifically states:

could be interpreted to include attorney's fees, but noted that it was not appropriate to conclude that the statute authorized the payment.[48] Specifically, the court held that this was an unusual expense, and that the legislature would not have contemplated the necessity of routine actions by the judiciary to protect its autonomy.[49]

The court did find, however, that the payment of the fees was mandated by the constitutional separation of powers.[50] The court distinguished two recent cases, one regarding attorney's fees for an action by the Carbon County Court of Common Pleas to compel disbursement of salary funds from the salary board,[51] and the other regarding a county salary board's refusal to recognize a request for a five percent salary increase for court employees.[52] Specifically, the court stated that neither case was brought by the judiciary to protect its own autonomy, neither established the reasonable necessity of the funding requests, and neither case was successful.[53]

In this case, the court reasoned, the inherent power of the judiciary, held to be implicit in the co-equal branch scheme, was threatened by another branch.[54] The court further stated that the judiciary should not be forced to spend limited resources maintaining its co-equal status.[55] The court, therefore, reversed the summary judgment and remanded the case to the trial court for a determination of the reasonableness of the attorney's fees.[56]

Juliante is important because it protects the judiciary's autonomy in hiring its personnel, but courts must still bear the costs of demanding the salary increases to maintain them.

> Except as otherwise provided by statute, each county shall continue to furnish to the court of common pleas and community court embracing the county, to the minor judiciary established for the county and to all personnel of the system, including central staff entitled thereto, located within the county, all necessary accommodations, goods and services which by law have heretofore been furnished by the county.

Id.

48. *Juliante*, 657 A.2d at 1249.
49. *Id.* at 1250.
50. *Id.* at 1252.
51. *Id. See* Lavelle v. Koch, 617 A.2d 319 (Pa. 1992).
52. *Juliante*, 657 A.2d at 1251. *See* Snyder v. Snyder, 620 A.2d 1133 (Pa. 1993).
53. *Juliante*, 657 A.2d at 1250.
54. *Id.* at 1252.
55. *Id.*
56. *Id.*

CONSTITUTIONAL LAW—FREEDOM OF EXPRESSION—Magazine Publishers of America v. Commonwealth, 654 A.2d 519 (Pa. 1995)—The Pennsylvania Supreme Court held that the application of a sales tax to magazines violates neither the First Amendment of the United States Constitution nor article I, section 7 of the state constitution.

CONSTITUTIONAL LAW—EQUAL PROTECTION—UNIFORMITY OF TAXATION—The Pennsylvania Supreme Court held that it is legitimate and reasonable to distinguish between magazines and newspapers in applying a sales tax on personal items.

The Magazine Publishers of America (the "Publishers") sought declaratory and injunctive relief from certain provisions of the Tax Code on several constitutional grounds.[57] First, the Publishers argued that an amendment to the Tax Code which eliminates a sales tax exemption for magazines, but not newspapers, violates the First Amendment to the Constitution.[58] The court held that while content-based taxation is constitutionally prohibited, the amendment provides for the taxation of all magazines regardless of content,[59] and further that the tax does not unconstitutionally target the press.[60]

Next, the court addressed the argument that the tax violates the free speech provisions of the Pennsylvania Constitution.[61] The court held that because the distinction between newspapers and magazines is based on frequency of publication and format, and not on content, the tax does not violate the state constitution.[62]

Finally, the court addressed the Publishers' claims under the

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57. Magazine Publishers of America v. Commonwealth, 654 A.2d 519 (Pa. 1995).

58. *Magazine Publishers of America*, 654 A.2d at 520. The amended provision states that the sales tax "shall not be imposed upon . . . (30) The sale at retail of newspapers." 72 PA. STAT. ANN. tit. 72, § 7204(30) (Supp. 1995). The First Amendment to the United States Constitution protects the freedom of the press. *See* U.S. CONST. amend I.

59. *Magazine Publishers of America*, 654 A.2d at 523.

60. *Id.* at 524.

61. *Id.* Article I, section 7 of the Pennsylvania Constitution states in part:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

PA. CONST. art. 1, § 7.

62. *Magazine Publishers of America*, 654 A.2d at 524.

equal protection provisions of both the state and federal constitution, and the uniformity clause of the Pennsylvania Constitution.[63] The court stated that none of the relevant provisions require exact uniformity.[64] Instead, the court noted, the distinction must be legitimate and reasonable.[65] Here, the court reasoned, the newspaper exemption is justified as providing low income citizens with an inexpensive, current news source.[66]

A dissenting opinion pointed out that the court lost an opportunity to provide Pennsylvania citizens with the broader freedom of expression provisions provided under the state constitution.[67] As noted by the dissent, the majority failed to reconcile the specific language of the Pennsylvania guarantee that "no law shall ever be made" to inhibit speech with its decision.[68]

II. Governmental Immunity

GOVERNMENTAL IMMUNITY—POLITICAL SUBDIVISION TORT CLAIMS ACT—SIDEWALK EXCEPTION—Finn v. City of Philadelphia, 664 A.2d 1342 (Pa. 1995)—The Pennsylvania Supreme Court held that the "sidewalk exception" is not applicable in a situation where a foreign substance found on the sidewalk resulted in injury to an individual.

The Supreme Court of Pennsylvania affirmed the decision of the commonwealth court and held in *Finn v. City of Philadelphia*[69] that the "sidewalk exception" to the Political Subdivision Tort Claims Act (the "PSTCA")[70] is not applicable in a situation where a foreign substance on the sidewalk resulted in injury to

63. *Id.* at 525. The Fourteenth Amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Pennsylvania Constitution equal protection clause states: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." PA. CONST. art. 1, § 26. Finally, Pennsylvania's uniformity provision states: "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." *Id.* at art. 8, § 1.

64. *Magazine Publishers of America*, 654 A.2d at 526.

65. *Id.*

66. *Id.*

67. *Id.* at 526 (Flaherty, J., dissenting).

68. *Id.*

69. 664 A.2d 1342 (Pa. 1995).

70. 42 PA. CONS. STAT. §§ 8541-8564 (1990 & Supp. 1995).

an individual.[71]

The plaintiff, Mary Finn ("Finn"), was walking along Vine Street in Philadelphia when she slipped on grease on the sidewalk and fell.[72] The accident resulted in injuries and Finn brought a personal injury action against the City of Philadelphia.[73] The City asserted the defense of governmental immunity[74] and moved for summary judgment.[75] Summary judgment was denied, the case was tried, and judgment was entered for Finn in the amount of $203,500.[76] The Pennsylvania Commonwealth Court reversed on appeal and held that an accumulation of a foreign substance, namely grease, on a city sidewalk does not constitute a "dangerous condition of sidewalks" sufficient to impose liability on a political subdivision.[77]

Finn's argument was premised on the belief that grease on the sidewalk constituted a dangerous condition and thus the

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71. *Finn*, 664 A.2d at 1346.

72. *Id.* at 1343.

73. *Id.*

74. *Id.* Governmental immunity or sovereign immunity is defined as:

> A judicial doctrine which precludes bringing suit against the government without its consent. Founded on the ancient principle that "the King can do no wrong," it bars holding the government or its political subdivisions liable for the torts of its officers or agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment.

BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

75. *Finn*, 664 A.2d at 1343. Summary judgment is defined as a "[p]rocedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved." BLACK'S LAW DICTIONARY 1435 (6th ed. 1990).

76. *Finn*, 664 A.2d at 1343.

77. Finn v. City of Philadelphia, 645 A.2d 320, 325 (Pa. Commw. Ct. 1994), *aff'd*, 664 A.2d 1342 (Pa. 1995). *See* 42 PA. CONS. STAT. § 8542(b)(7). Section 854-2(b)(7) states:

> (b) Acts which may impose liability.—The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
>
> . . . .
>
> (7) Sidewalks—A dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition. When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.

Id.

exception was applicable.[78] In analyzing Finn's argument, the supreme court held that it would be erroneous to focus on the word "of" rather than the word "on" in the sidewalk exception to the PSTCA.[79] The court noted that emphasis should be placed on an analysis of the legislative intent regarding the "dangerous condition" phrase in the PSTCA.[80] Conversely, the City argued that in order for Finn to prevail, the claim against the City must establish an artificial condition or defect of the sidewalk.[81] The City further argued that because the grease did not derive or originate from the sidewalk, there was no defect.[82] Therefore, the City argued, as a matter of law it was not liable to Finn.[83]

The supreme court noted that the intent of the legislature had been to provide for immunities.[84] The supreme court has held that exceptions to immunities must, therefore, be strictly interpreted.[85] The court noted that it has consistently held that the rule of immunities can only be waived if the defect or the condition of the land itself causes an injury.[86] Therefore, the court held that foreign matter found on a city sidewalk would not subject a city to liability under the "sidewalk exception" to the PSTCA.[87]

The supreme court ultimately concluded that governmental liability exists only in situations when an injury results from a condition deriving or originating from the government's realty.[88] Therefore, the court held that Finn was unable to establish a defect of the sidewalk itself and only alleged a dangerous condition on the sidewalk.[89] The supreme court concluded that

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78. *Finn*, 664 A.2d at 1343.

79. *Id.*

80. *Id. See supra* note 77 for text of 42 PA. CONS. STAT. § 8542(b)(7).

81. *Finn*, 664 A.2d at 1344. The City asserted:

> [C]laims involving government property must establish an artificial condition or defect of the property itself, and that an actionable dangerous condition of government property must derive, originate from, or have as its source the property in question and may not arise from a source outside the property.

Id. at 1343-44.

82. *Id.* at 1344.

83. *Id.*

84. *Id. See* The Political Subdivision Tort Claims Act, 42 PA. CONS. STAT. §§ 8541-8564; *see also* The Sovereign Immunity Act, 42 PA. CONS. STAT. §§ 8521-8528 (1990 & Supp. 1995).

85. *Finn*, 664 A.2d at 1344. *See generally* Snyder v. Harmon, 562 A.2d 307 (Pa. 1989) (holding that the statutory language of the PSTCA requires that a dangerous condition must originate in the realty); Mascaro v. Youth Study Ctr., 523 A.2d 1118 (Pa. 1987) (holding that the real estate exception is applicable only in situations where a defect of the property resulted in injury).

86. *Finn*, 664 A.2d at 1345.

87. *Id.*

88. *Id.* at 1346.

89. *Id.* The supreme court stated: "In the language of the statutory exception

the commonwealth court correctly applied the statutory exception set forth in the PSTCA and therefore, affirmed the decision of the commonwealth court.[90]

Finn clarifies that the sidewalk exception is not applicable in situations where foreign materials or substances on the sidewalk result in injury. The sidewalk itself must contain a defect sufficient to result in an injury for the exception to the PSTCA to apply.

GOVERNMENTAL IMMUNITY—POLITICAL SUBDIVISION TORT CLAIMS ACT—SOVEREIGN IMMUNITY ACT—Jones v. Chieffo, 664 A.2d 1091 (Pa. Commw. Ct. 1995)—The Pennsylvania Commonwealth Court held that summary judgment is improper when reasonable jurors could find that intervening criminal acts of a third party should have been foreseeable as to municipal defendants, whose negligence was a substantial contributing factor in a resulting motor vehicle accident.

In *Jones v. Chieffo,*[91] the Pennsylvania Commonwealth Court held that a trial court errs in granting summary judgment when there exists genuine issues of material fact that a municipal defendant's conduct is a substantial contributing factor in causing a motor vehicle accident.[92] Therefore, municipal defendants are not entitled to absolute immunity resulting in a judgment as a matter of law in all tort actions where criminal conduct of an intervening third party causes, in part, the resultant accident.[93]

In *Jones*, Kent Jones ("Jones") individually, and as Administrator of the Estate of Bridgett Jones, his deceased wife, filed wrongful death and survival actions against Officer Charles Chieffo ("Chieffo"), Commissioner Williams, Mayor Wilson, the City of Philadelphia and the City of Philadelphia Police Department in the United States District Court for the Eastern District of Pennsylvania.[94] The action was subsequently transferred to the Court of Common Pleas of Philadelphia County.[95] In conjunction with the proceedings in district court, the parties stipu-

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to governmental immunity, the dangerous condition was on the sidewalk, not of the sidewalk, and thus is insufficient to create liability in the city." *Id.*

90. *Id.*

91. 664 A.2d 1091 (Pa. Commw. Ct. 1995).

92. *Jones*, 664 A.2d at 1096.

93. *Id.* at 1095.

94. *Id.* at 1092.

95. *Id.* The action was transferred to state court after discovery and summary judgment proceedings had been conducted. *Id.*

lated that if Chieffo's police car had a working siren, then Jones would have heard the siren and potentially would have avoided the accident.[96] The parties further stipulated that the Philadelphia Police Department was aware that several of its police vehicles did not have operational sirens.[97]

Chieffo testified by deposition that he was in pursuit of three vehicles and while in pursuit he heard a gunshot that came from one of the three vehicles.[98] Chieffo activated the vehicle's dome lights and attempted to activate the siren, but found it to be non-operational.[99] Chieffo advised his supervisor of the pursuit and continued in pursuit for approximately thirteen blocks.[100] The second and third vehicles ran a red light.[101] The third vehicle collided with Jones in the intersection and the collision resulted in the death of Jones' wife.[102]

Police Lieutenant Herbert Groscsik testified that as a result of concern by the police department over liability stemming from pursuits, the department issued Directive 45.[103] Directive 45 requires that all pursuits be reported to an acting supervisor for a determination of whether or not pursuit should be continued.[104] Additionally, all patrol cars were to have functional sirens.[105]

The trial court relied on *Foster v. City of Pittsburgh*[106] in granting summary judgment for the municipal defendants.[107] In *Foster*, the court held that even if an officer did not have the vehicle's siren on during a pursuit, this fact in and of itself does

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96. *Id.*

97. *Jones*, 664 A.2d at 1092.

98. *Id.* at 1092-93. Chieffo was initially investigating a report of vehicle property damage when he observed the three vehicles disregard a stop sign. *Id.* at 1092.

99. *Id.* at 1092.

100. *Id.*

101. *Id.*

102. *Jones*, 664 A.2d at 1092-93. Jones testified by deposition that as he entered the intersection he looked to the right and saw the car followed by the police vehicle. *Id.* at 1093. The police vehicle had its lights on. *Id.* Jones estimated the speed of both vehicles at approximately 70-80 miles per hour. *Id.* Jones applied his brakes, but was unable to avoid contact with the vehicle. *Id.*

103. *Id.* at 1093. Directive 45 became effective on August 26, 1985. *Id.* This was notably more than four years prior to the date of the instant action. *Id.*

104. *Id.*

105. *Id.* Police Captain Thomas Doyle testified that the pursuit should have been terminated by the supervisor because Chieffo's police vehicle did not have an operational siren. *Id.*

106. 639 A.2d 929 (Pa. Commw. Ct.), *appeal denied*, 648 A.2d 791 (Pa. 1994) (holding that the criminal act of a driver is a superseding cause sufficient to absolve a city of liability, despite the fact that an officer failed to comply with the vehicle code in not activating the vehicle's siren and warning lights during pursuit).

107. *Jones*, 664 A.2d at 1093.

not establish negligence on the part of a city.[108] In *Jones*, the trial court further held that a criminal act of fleeing a pursuing police vehicle acts as a superseding cause sufficient to preclude any possible liability of a city.[109]

On appeal, Jones argued that the trial court erred in granting summary judgment in light of the Pennsylvania Supreme Court's decision in *Powell v. Drumheller*.[110] In *Powell*, it was alleged that the Department of Transportation (the "DOT") negligently designed a road because the road lacked center markings and shoulders.[111] The supreme court held that it did not necessarily follow that any criminal violation is automatically a superseding cause.[112]

The commonwealth court, noting the supreme court's decisions in *Fisher* and *Powell*, concluded that municipal defendants are not entitled to "blanket" immunity for all tort claims when injuries are caused to a victim by intervening criminal conduct of a third party.[113] The court stated that it was for the jury to determine that if the police vehicle had an appropriately functioning siren, then the Jones' vehicle would not have entered the intersection.[114] The court noted that if the jury determined that the conduct of the third party was a substantial contributing factor in the resulting injuries, the jury must then determine if the conduct was so unusual as to be unforeseeable.[115] If the conduct was deemed unforeseeable, the court stated that it would constitute a superseding cause sufficient to preclude liability on the part of the City.[116] Therefore, the court held that it was error for the trial court to grant summary judgment in favor of the City and the commonwealth court reversed and remanded.[117]

The commonwealth court in *Jones* clarified the issue of a municipal defendant's liability and lack of absolute immunity in

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108. *Foster*, 639 A.2d at 932.

109. *Jones*, 664 A.2d at 1093.

110. *Id. See* Powell v. Drumheller, 653 A.2d 619 (Pa. 1995) (holding that negligence of the Department of Transportation (the "DOT") is an issue for the jury as is the issue of negligence of an intoxicated driver constituting a superseding cause sufficient to preclude liability of the DOT).

111. *Powell*, 653 A.2d at 621. Powell alleged that the DOT's negligent design of London Tract Road led to the death of her husband. *Id.*

112. *Id.* at 624. The Pennsylvania Supreme Court stated: "[W]e do not agree that any violation of a criminal statute constitutes a superseding cause. Instead, the proper focus is not on the criminal nature of the negligent act, but instead on whether the act was so extraordinary as not to be reasonably foreseeable." *Id.*

113. *Jones*, 664 A.2d at 1095.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

situations where criminal conduct by a third party has resulted in injury. Municipalities will no longer be able to rely on a shield of absolute immunity in situations similar to *Jones*.

GOVERNMENTAL IMMUNITY—POLITICAL SUBDIVISION TORT CLAIMS ACT—REAL PROPERTY EXCEPTION—Grieff v. Reisinger, 654 A.2d 77 (Pa. Commw. Ct. 1995)—The Pennsylvania Commonwealth Court held that the real property exception to governmental immunity does not apply to injuries resulting from the alleged mishandling of combustible liquids by a volunteer fire association and its chief.

In *Grieff v. Reisinger*[118] the Pennsylvania Commonwealth Court held that the real property exception to the Political Subdivision Tort Claims Act (the "PSTCA")[119] is not applicable in a situation where the alleged injuries occurred due to negligent use of combustible liquids on a fire station floor, rather than due to a defect or to the condition of the floor itself.[120]

In *Grieff*, members of the Emlenton Volunteer Fire Association (the "EVFA") assembled at the fire station for the purpose of organizing and cleaning tools for placement on a new fire vehicle.[121] Robert Grieff ("Grieff") was the chief of the EVFA.[122] Marlene Reisinger ("Reisinger") was a personal friend of Grieff and had been invited into the fire station while on her way home from work.[123] Reisinger participated in the cleaning

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118. 654 A.2d 77 (Pa. Commw. Ct. 1995).

119. 42 PA. CONS. STAT. §§ 8541-8542 (1982 & Supp. 1995). Section 8541 states: "Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." *Id.* § 8541.

Section 8542(b)(3) states:

> The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency. A [sic] used in this paragraph, "real property" shall not include:
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> (i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
>
> (ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;
>
> (iii) streets; or
>
> (iv) sidewalks.

Id. § 8542(b)(3).

120. *Grieff*, 654 A.2d at 80. The court stated: "It was not the floor of the fire station itself that caused Marlene Reisinger to be injured, Mrs. Reisinger received her injuries when she was engulfed in the flames of a fire which ignited from the alleged negligent mishandling of combustible liquids." *Id.*

121. *Id.* at 78.

122. *Id.*

123. *Id.* Reisinger decided to stay at the station to watch television and drink

and painting of the fire vehicle equipment.[124] While cleaning the floor with paint thinner, Grieff caused the thinner to flow under a refrigerator and the thinner ignited.[125] Reisinger, who was standing nearby, was engulfed in flames.[126]

Reisinger and her husband initiated a negligence action against Grieff and the EVFA, alleging negligence on the part of both.[127] Grieff and the EVFA filed an answer and new matter and raised the defense of sovereign immunity.[128] The Reisingers filed a reply to new matter which merely reiterated the allegations set forth in the complaint.[129] Grieff and the EVFA filed a motion for summary judgment, asserting immunity under the PSTCA.[130] Grieff and the EVFA further asserted that the Reisingers failed to plead one of the specific exceptions to the PSTCA.[131]

Reisinger, in a brief in opposition to the motion for summary judgment, asserted for the first time the real property exception to the PSTCA.[132] The trial court denied the motion for summary judgment and held that the Reisingers were not required to specifically plead the real property exception.[133]

On appeal, Grieff and the EVFA asserted that neither the complaint nor the reply to new matter were sufficient to establish that the accident resulted from a defect or dangerous condition of the floor.[134] The commonwealth court noted that it is well-established under Pennsylvania law that the real property exception is inapplicable in situations where an injury is not caused by the condition of the property; but rather, the dangerous condition merely facilitates the injuries.[135] The court stated

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beer with the fire fighters. *Id.*

124. *Id.*

125. *Grieff*, 654 A.2d at 78. Grieff was cleaning the floor near the kitchen where excess from earlier spray painting collected on the floor. *Id.* Grieff poured paint thinner on the floor and attempted to brush it with a broom, resulting in the liquid running under the refrigerator. *Id.* A flash fire resulted and severely injured Reisinger. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 79. *See supra* note 119 for the text of §§ 8541 and 8542.

129. *Grieff*, 654 A.2d at 79.

130. *Id.*

131. *Id. See generally* 42 PA. CONS. STAT. § 8542 (setting forth the specific exceptions to the PSTCA).

132. *Grieff*, 654 A.2d at 79. *See* 42 PA. CONS. STAT. § 8542(b)(3).

133. *Grieff*, 654 A.2d at 79. The trial court concluded: "[S]uch an allegation brings the conduct within the real property exception without the need to specifically plead the exception." *Id.*

134. *Id.* at 80.

135. *Id. See* Mascaro v. Youth Study Ctr., 523 A.2d 1118 (Pa. 1987). The court, citing *Mascaro*, stated: "The exception will not apply where the injury is merely 'fa-

that the alleged negligent act must be a direct result of the condition of the property.[136]

The Supreme Court of Pennsylvania recently reaffirmed the principles set forth in earlier cases in *Kiley v. City of Philadelphia*.[137] In *Kiley*, the court stated that it is clearly defined in Pennsylvania jurisprudence that a negligent act must arise from an actual defect.[138] Immunity can be waived only in those situations where it has been specifically alleged that the defect resulted in the injury.[139]

In *Grieff*, the commonwealth court indicated that the Reisingers failed to allege that the injury was a result of a defect in the fire station property.[140] The court stated that it was notable that the floor did not cause the injuries to Reisinger, but rather, the injuries were caused by the alleged actions of Grieff and the EVFA.[141] Because no allegations of a defect were asserted, the court held that the present cause of action did not fall within the purview of the real property exception to the PSTCA.[142] Therefore, the commonwealth court held that the trial court erred in denying summary judgment for Grieff and the EVFA.[143]

The commonwealth court's decision in *Grieff* affirms the well-established principle of Pennsylvania law that an actual defect must exist that creates or causes the injury. Negligence without a defect is not sufficient to invoke the real property exception to the PSTCA.

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cilitated' by the dangerous condition of the real property and not caused by the dangerous condition of the real property itself." *Grieff*, 654 A.2d at 80 (citing *Mascaro*).

136. *Grieff*, 654 A.2d at 80. *See* Houston v. Central Bucks Sch. Auth., 546 A.2d 1286 (Pa. Commw. Ct. 1988), *allocatur denied*, 562 A.2d 332 (Pa. 1989).

137. 645 A.2d 184 (Pa. 1994) (holding that the City of Philadelphia was not liable to an injured party who was injured in the street while avoiding sidewalk construction because the sidewalk was not defective).

138. *Kiley*, 645 A.2d at 187.

139. *Id.*

140. *Grieff*, 654 A.2d at 80. The court noted:

> To the contrary, the Reisingers allege in the pleadings that . . . [Grieff's and the EVFA's] negligent conduct alone, albeit in the process of caring for local agency real property, caused the injuries. Nothing in the pleadings or in the record indicate that Mrs. Reisinger's injuries were caused by anything other than the negligence of appellants in mishandling combustibles.

Id.

141. *Id.*

142. *Id. See* 42 PA. CONS. STAT. § 8542.

143. *Grieff*, 654 A.2d at 80.

III. Tort Law

TORTS—WRONGFUL DEATH AND SURVIVAL ACTIONS—DISCOVERY RULE—Baumgart v. Keene Building Products Corp., 666 A.2d 238 (Pa. 1995)—The Pennsylvania Supreme Court, in an evenly divided opinion, affirmed the decision of the Superior Court of Pennsylvania and held that as a matter of law, if the existence of an injury could be reasonably ascertained within the prescribed statutory period, the discovery rule is inapplicable and summary judgment is appropriate.

The Supreme Court of Pennsylvania held in *Baumgart v. Keene Building Products Corp.*[144] that as a matter of law, if the existence of an injury could be reasonably ascertained within the prescribed statutory period, the discovery rule is inapplicable and summary judgment is appropriate.[145]

In *Baumgart,* Anthony Baumgart (the "decedent") was allegedly exposed to asbestos materials from 1950 to 1980 while employed by Witco Chemical Corporation.[146] In January of 1985, the decedent was diagnosed with mesothelioma.[147] The decedent and his wife were advised of the diagnosis in January of 1985.[148] The decedent repeatedly denied exposure to asbestos.[149] The decedent died on March 31, 1985 from mesothelioma and related pulmonary complications.[150]

The decedent's wife filed a petition under the Worker's Compensation Act five months after the decedent's death.[151] On March 26, 1987, the decedent's wife filed survival and wrongful death actions against a variety of manufacturers and suppliers of asbestos-containing products.[152] The trial court held that both the survival and wrongful death actions were barred by the applicable two year statute of limitations period for personal

144. 666 A.2d 238 (Pa. 1995).

145. *Baumgart*, 666 A.2d at 240.

146. *Id.* at 239.

147. *Id.* at 239-40. In January of 1985, the decedent underwent a fiberoptic bronchoscopy. *Id.* The procedure enabled the decedent's physician to take a pleural biopsy. *Id.* at 240. The biopsy revealed the presence of mesothelioma which is a rare form of cancer which generally results from exposure to asbestos. *Id.*

148. *Id.* at 240.

149. *Id.*

150. *Baumgart*, 666 A.2d at 240. The decedent had been hospitalized between February 13, 1985 and March 9, 1985. *Id.* The decedent's diagnosis was confirmed during this period. *Id.* The decedent reentered the hospital on March 19, 1985 and subsequently died on March 31, 1985. *Id.*

151. *Id.*

152. *Id.*

injury.[153] Therefore, summary judgment was granted in favor of all manufacturers and suppliers.[154]

The superior court reversed the trial court's grant of summary judgment for the wrongful death claim and affirmed the trial court's grant of summary judgment for the survival action.[155] The supreme court granted allocatur[156] to determine whether the survival action, as a matter of law, was barred by the applicable statute of limitations.[157]

The supreme court's Opinion in Support of Affirmance began with a discussion of the discovery rule.[158] The court noted that the decedent and his wife actually knew of the injury and the causative agent within the limitations period.[159] The court, referencing its prior decision in *Pocono International Raceway, Inc. v. Pocono Produce, Inc.*,[160] noted that a statute of limitations begins to run as soon as the right to maintain a cause of action arises.[161] The court noted that the discovery rule acts to mitigate the harsh effects of the statute of limitations.[162]

However, the court opined that in the instant action the discovery rule was inapplicable because the cause of the injury was

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153. *Id. See* 42 PA. CONS. STAT. § 5524(2) (1990) (providing that "[t]he following actions and proceedings must be commenced within two years: . . . (2) [a]n action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.").

154. *Baumgart*, 666 A.2d at 240.

155. *Id. See* Baumgart v. Keene Building Prods. Corp., 633 A.2d 1189 (Pa. Super. Ct. 1992), *aff'd*, 666 A.2d 238 (Pa. 1995).

156. Allocatur is defined as "[a] word . . . used to denote that a writ or order was allowed." BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

157. *Baumgart*, 666 A.2d at 240. *See supra* note 153 for the pertinent text of the applicable statute of limitations.

158. *Baumgart*, 666 A.2d at 240 (Zappala, J., Opinion in Support of Affirmance). The discovery rule tolls the running of the applicable statute of limitations. *Id.* (citing Hayward v. Medical Ctr. of Beaver, 608 A.2d 1040, 1043 (Pa. 1992)). The discovery rule is applicable when an injured party could not have reasonably been expected to ascertain the existence of an injury. *Id.* (citing *Hayward*, 608 A.2d at 1043 (stating that the limitations period does not begin to run until such time as discovery of the injury is reasonably possible)). *Id.* However, if the discovery of the injury was reasonably possible within the limitations period, the discovery rule does not apply and the statute of limitations is not tolled. *Id.*

159. *Id.*

160. 468 A.2d 468 (Pa. 1983) (holding that a statute of limitations begins to run as soon as the right to institute suit arises and lack of sufficient knowledge due to failure to exercise due diligence, mistake or misunderstanding do not act to toll the statute).

161. *Baumgart*, 666 A.2d at 240.

162. *Id. See* Ingenito v. AC & S, Inc., 633 A.2d 1172, 1175 (Pa. 1993) (holding that a worker had not used reasonable diligence in pursuing the cause of his injury, so the discovery rule did not act to toll the statute of limitations).

readily ascertainable.[163] Therefore, the court held that summary judgment was proper as to the survival action because the decedent and his wife knew of the causative agent that resulted in the injuries and this knowledge triggered the running of the statute.[164]

The Opinion in Support of Reversal, authored by Justice Montemuro, noted that the superior court correctly applied the statute of limitations to the wrongful death claim.[165] The superior court held that because the action was commenced on March 26, 1987 and the decedent died on March 31, 1985, the wrongful death claim was proper and should not have been dismissed.[166] However, the Opinion in Support of Reversal believed that the superior court incorrectly applied the statute of limitations to the survival action by refusing to apply the discovery rule.[167] Justice Montemuro indicated that neither the decedent nor his wife were under an absolute duty to discover the existence of the injury or its causative agent.[168] Justice Montemuro noted that the decedent and his wife merely had to utilize reasonable diligence[169] in ascertaining the cause of the mesothelioma.[170]

The justices supporting reversal agreed with the argument of the decedent's wife that the issue of whether or not the decedent used due diligence in determining the causative agent should be a question for the jury.[171] Therefore, the justices opined that a grant of summary judgment as to the survival action was inappropriate.[172] However, because the supreme court was evenly divided on the issue, the opinion of the superior court was affirmed.[173]

The affirmance of the superior court's opinion establishes that a court may make a retrospective determination of the reason-

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163. *Baumgart*, 666 A.2d at 241.

164. *Id.*

165. *Id.* at 243 (Montemuro, J., Opinion in Support of Reversal).

166. *Id.* The statute of limitations for a wrongful death cause of action begins to run at death. *Id.*

167. *Id.*

168. *Baumgart*, 666 A.2d at 244. The Opinion in Support of Reversal stated: "Thus, this case law teaches that a plaintiff is not under an absolute duty to discover the cause of his illness. Instead, he must exercise only the level of diligence that a reasonable man would employ under the facts and circumstances presented in a particular case." *Id.*

169. *Id.* Reasonable diligence is defined as "a reasonable effort to discover the cause of an injury under the facts and circumstances present in the case." *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Baumgart*, 666 A.2d at 240.

ableness and diligence of a party in determining the causative agent of an injury. This determination, prior to *Baumgart*, was a factual determination within the realm of the jury. Now courts may make a determination, as a matter of law, as to the reasonableness and diligence of a party in discovering the cause of injury.

TORTS—PERSONAL INJURY—DAMAGES—STANDARD FOR REMITTITUR—Haines v. Raven Arms, 652 A.2d 1280 (Pa. 1995)—The Pennsylvania Supreme Court held that a trial court may only grant remittitur when the amount of a verdict shocks the conscience of the court or its sense of justice, and the trial court must articulate a conclusion and reason for granting remittitur.

The Pennsylvania Supreme Court held in *Haines v. Raven Arms*[174] that the correct standard for remittitur[175] is whether a verdict so shocks the judicial conscience as to suggest that the jury was influenced by partiality, prejudice, mistake or corruption.[176] The supreme court further held that a trial court must articulate a conclusion and reason for granting remittitur.[177]

In *Haines*, Brenda Teagle (the "gun owner") purchased a Raven Arms P-25 semi-automatic handgun for self-protection.[178] The gun owner purchased the gun from Donn's Inc. (the "seller").[179] The gun owner testified that she had no prior knowledge of handguns.[180] The gun owner had a neighbor load the gun.[181] Two years later, Diane Teagle (the "gun owner's daughter") showed the gun to two visitors, Walter Butler (the "shooter") and Tamika Haines ("Tamika").[182] The shooter removed the magazine and pulled the trigger, assuming that it was unloaded.[183] Tamika was struck in the head by the bullet.[184]

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174. 652 A.2d 1280 (Pa. 1995) (supplemental opinion).

175. Remittitur is defined as: "The procedural process by which an excessive verdict of the jury is reduced." BLACK'S LAW DICTIONARY 1295 (6th ed. 1990).

176. *Haines*, 652 A.2d at 1281.

177. *Id.* at 1281-82.

178. Haines v. Raven Arms, 640 A.2d 367 (Pa. 1994) (holding that the verdict was excessive and failed to bear a reasonable relationship to the injuries and associated pain and suffering), *aff'd on reh'g*, 652 A.2d 1280 (Pa. 1995).

179. *Haines*, 640 A.2d at 368.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Haines*, 640 A.2d at 368. The bullet struck Tamika below the left eye. *Id.* Tamika underwent several operations in the years subsequent to the shooting. *Id.*

The jury found the seller, the gun owner, the gun owner's daughter and the shooter liable for negligence.[185] Damages were awarded in the following amounts: medical expenses—$125,802.60; loss of earnings—$725,000; care and supervision—$2,500,000; and pain and suffering—$8,000,000.[186] Damages totaled $11,350,802.60.[187] The seller moved for remittitur as to the damages for pain and suffering after the jury's verdict.[188] The damages for pain and suffering were reduced from eight million to five million dollars.[189] The superior court affirmed the grant of remittitur and the supreme court granted allocatur[190] to consider the issue of remittitur.[191] The supreme court affirmed the decision of the trial court.[192]

The supreme court, upon reconsideration, directed the trial court to file a supplemental opinion to delineate the exact standard that was used to grant remittitur.[193] In the supplemental opinion of the trial court, the trial court indicated that the standard applied was whether the verdict so shocked the judicial sense of justice that it suggested jury influence.[194] The supreme court, in its supplemental opinion, indicated that such a statement of shocking the judicial conscience is necessary to ensure that the correct standard is utilized and the use of this standard would also facilitate meaningful appellate review.[195]

The supreme court was satisfied that the trial court had both applied the appropriate standard and stated the rationale for

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Tamika was diagnosed with several residual impairments. *Id.* Tamika has impairments in her vision, cognitive abilities and memory and motor dysfunctions. *Id.*

185. *Id.*

186. *Id.* at 368-69.

187. *Id.* at 369.

188. *Id.*

189. *Haines*, 640 A.2d at 369.

190. Allocatur is defined as a "word . . . used to denote that a writ or order was allowed." BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

191. *Haines*, 640 A.2d at 369. The supreme court stated:

> [The trial court] granted the remittitur because the verdict was excessive and failed to bear a reasonable relationship to . . . [Tamika's] pain and suffering. Damages for pain and suffering are compensatory in nature, may not be arbitrary, speculative, or punitive, and must be reasonable. The trial court's justification for the remittitur does not manifest an abuse of discretion. Accordingly, the judgment of the Superior Court must be affirmed.

Id. at 370.

192. *Id.* at 370.

193. *Haines*, 652 A.2d at 1281. Justice Flaherty authored the supplemental supreme court opinion and stated: "Upon reconsideration, the trial court was directed to file a supplemental opinion explicating the standard upon which remittitur was granted, and the parties were given opportunity to file briefs in response to the supplemental opinions." *Id.*

194. *Id.*

195. *Id.*

the decision and therefore, the grant of remittitur was affirmed.[196] *Haines* serves to clarify the necessary standard for a grant of remittitur. The use of the required statement eliminates the potential practice of granting arbitrary remittitur based on conclusory statements.

TORTS—PRODUCTS LIABILITY—VOLUNTARY ASSUMPTION OF THE RISK—SAFETY MEASURES—Robinson v. B.F. Goodrich Tire Co., 664 A.2d 616 (Pa. Super. Ct. 1995)—The Pennsylvania Superior Court held that a trial court commits reversible error by instructing a jury that an injured party could be found to have voluntarily assumed a risk if the party failed to utilize available safety measures.

In *Robinson v. B.F. Goodrich Tire Co.*,[197] the Pennsylvania Superior Court held that a trial court commits reversible error by instructing a jury that an injured party could be found to have voluntarily assumed a risk if the party failed to utilize available safety measures.[198]

In *Robinson,* John Robinson ("Robinson") was inflating a tire for a customer at a service station.[199] During the inflation, the sidewall of the tire blew out and struck Robinson in the face, resulting in injuries to his face and ear.[200] Robinson asserted that the tire had been defectively manufactured and subsequently brought an action alleging strict products liability against the tire retailer and manufacturer.[201]

The manufacturer and retailer contended that Robinson, because of his previous experience with tires, should have known of the potential risk of an explosion and because of this knowledge, voluntarily assumed the risk of his resulting injury.[202] During jury instructions, the trial court stated that assumption of the risk[203] is a complete defense to strict liability.[204]

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196. *Id.* at 1282.

197. 664 A.2d 616 (Pa. Super. Ct. 1995).

198. *Robinson*, 664 A.2d at 619.

199. *Id.* at 617.

200. *Id.*

201. *Id.* The tire was one of a set of four manufactured by B.F. Goodrich and sold by Montgomery Ward. *Id.* The manufacture and sale had been within the month prior to the accident. *Id.*

202. *Id.*

203. Assumption of the risk is defined as: "A defense to action of negligence which consists of showing that the plaintiff, knowing the dangers and risk involved, chose to act as he did." BLACK'S LAW DICTIONARY 123 (6th ed. 1990).

204. *Robinson*, 664 A.2d at 617. The trial court stated: "Assumption of a risk is

The superior court, in its analysis of the case, noted that under Pennsylvania law an injured party cannot be precluded from recovering in a products liability action because of negligence on the part of the injured party.[205] Therefore, the court noted that contributory negligence[206] is not an available defense in a products liability suit.[207] The court noted that often the application of the doctrines of assumption of the risk and contributory negligence are intertwined.[208]

In the instant action, the court held that the evidence failed to demonstrate that *Robinson* was aware of any specific defect in the tire.[209] The manufacturer and retailer asserted that there was no existing defect in the tire.[210] The manufacturer and the retailer argued in the alternative that if a defect was found, then Robinson should have known of the potential danger of the tire exploding.[211] Therefore, Robinson, in essence, would be guilty of contributory negligence and not assumption of the risk.[212]

The superior court concluded that the trial court confused the doctrines of contributory negligence and assumption of the risk.[213] The court held that this confusion had the effect of influencing the jury such that a new trial should be granted.[214]

The superior court's opinion clarifies the doctrines of contributory negligence and assumption of the risk as they apply to products liability actions. The doctrine of contributory negligence is not an available defense to a products liability action. Therefore, injured parties in Pennsylvania may recover in a products liability action even when contributory negligence is shown.

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a bar to the assuming party's claim when the party assuming the risk possessed the requisite subjective awareness of the dangers and voluntarily assumed the risk by failing to utilize available safety measures." *Id.*

205. *Id.* at 618. *See* Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 901 (Pa. Super. Ct. 1975) (holding that strict liability of a seller does not depend upon a showing of negligence on the seller's part and the issue of adequacy of safety warnings is a question for the jury).

206. Contributory negligence is defined as: "Conduct by a plaintiff which is below the standard to which he is legally required to conform for his own protection and which is a contributing cause which cooperates with the negligence of the defendant in causing the plaintiff's harm." BLACK'S LAW DICTIONARY 1033 (6th ed. 1990).

207. *Robinson*, 664 A.2d at 618. *See* McCown v. International Harvester Co., 342 A.2d 381 (Pa. 1975) (holding that contributory negligence is not a defense against a Section 402A products liability cause of action).

208. *Robinson*, 664 A.2d at 618.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 618-19.

213. *Robinson*, 664 A.2d at 619.

214. *Id.*

TORTS—DRAM SHOP ACT—INTOXICATING LIQUORS—VISIBLE INTOXICATION—LICENSEE AND EMPLOYEE LIABILITY—Detwiler v. Brumbaugh, 656 A.2d 944 (Pa. Super. Ct. 1995)—The Pennsylvania Superior Court held that the Dram Shop Act contains a limiting provision whereby licensees are liable only when patrons were visibly intoxicated and held that the Dram Shop Act is applicable to employees of licensees.

The Pennsylvania Superior Court, in *Detwiler v. Brumbaugh*,[215] held that an employee of a licensee is not insulated from liability when the employee serves alcoholic beverages to a visibly intoxicated customer.[216]

In *Detwiler*, Ellen Detwiler ("Detwiler") filed suit against Ronald and Nancy Brumbaugh (the "licensees"), alleging that she sustained personal injuries in a motor vehicle accident caused by David Dubbs ("Dubbs"), who had consumed alcoholic beverages prior to the accident.[217] The trial court dismissed the suit and granted the licensees' preliminary objections in the nature of a demurrer.[218] The trial court held that under the provisions of the Pennsylvania Dram Shop Act, section 4-497 of the Pennsylvania Liquor Code ("section 4-497"),[219] only a licensee can be held liable to a third party and individual employees are, therefore, insulated from liability.[220]

The superior court addressed the issue of whether section 4-497 insulates employees of licensees from liability when the employee serves a visibly intoxicated customer.[221] The superior

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215. 656 A.2d 944 (Pa. Super. Ct. 1995).

216. *Detwiler*, 656 A.2d at 945.

217. *Id.* Dubbs died as a result of the motor vehicle accident. *Id.* Detwiler asserted that Dubbs had consumed alcoholic beverages at The Creekside Inn (the "Inn"), owned by the licensees, immediately prior to the accident. *Id.* Detwiler's complaint asserted that the licensees were the owners, managers, and/or proprietors of the Inn. *Id.* The complaint further asserted that the Inn was licensed to sell and serve alcohol by the Pennsylvania Liquor Control Board. *Id.*

218. *Id.* A demurrer is defined as: "An allegation of a defendant, which, admitting the matters of fact alleged by complaint . . . to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed . . . ." BLACK'S LAW DICTIONARY 432-33 (6th ed. 1990).

219. *See* PA. STAT. ANN. tit. 47, § 4-497 (1969 & Supp. 1995).

220. *Detwiler*, 656 A.2d at 945-46.

221. *Id.* at 945. The superior court stated: "The trial court's holding that section 4-497 insulates individual employees of a licensee is an erroneous interpretation of the statute." *Id.* at 946. Section 4-497 states:

> No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee unless the customer who inflicts the damage was sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employee

court held that the trial court's interpretation of section 4-497 as imposing liability only upon licensees was erroneous.[222] Section 4-497 was created to act as a barrier providing protection, the court noted, instead of a provision defining its application to parties.[223]

The superior court noted that liability has been traditionally imposed upon the finding of a duty owed to a particular party.[224] Section 4-493 of the Pennsylvania Liquor Code, the court noted, established the duties imposed upon those who served alcohol to Dubbs.[225]

Detwiler, the court recognized, averred in her complaint that because of the actions of the licensees or their employees she sustained physical injuries.[226] The superior court concluded that Detwiler averred sufficient facts which if proven would permit recovery on her cause of action.[227] Therefore, the court held that it was erroneous for the trial court to dismiss the cause of action based on the licensees' preliminary objections in the nature of a demurrer.[228] The decision of the trial court was subsequently vacated.[229]

The superior court's opinion clarifies that section 4-493 of the Pennsylvania Liquor Code imposes duties upon licensees and their employees to refrain from serving intoxicating beverages to visibly intoxicated individuals. Clarifying this point will add another avenue for recovery for those injured by individuals who have been served alcohol while visibly intoxicated.

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when the said customer was visibly intoxicated.

PA. STAT. ANN. tit. 47, § 4-497.

222. *Detwiler*, 656 A.2d at 946. The superior court stated: "Section 4-497 is clearly a limiting provision designed to specifically shield licensees from liability to third parties except in those instances where the patron served was visibly intoxicated." *Id.*

223. *Id.*

224. *Id. See* Fennell v. Nationwide Mut. Fire Ins. Co., 603 A.2d 1064 (Pa. Super. Ct.) (holding that liability may be imposed upon a finding of a duty, breach of the duty and that harm was proximately caused by the breach of that duty), *allocatur denied*, 617 A.2d 1274 (Pa. 1992).

225. *Detwiler*, 656 A.2d at 946. Section 4-493(1) states in pertinent part:

> It shall be unlawful . . . [to f]urnish[] liquor or malt or brewed beverages to certain persons
>
> (1) For any licensee . . . or any employe, servant or agent of such licensee . . . to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated . . . .

PA. STAT. ANN. tit. 47, § 4-493(1) (Supp. 1995).

226. *Detwiler*, 656 A.2d at 945.

227. *Id.* at 947.

228. *Id.* at 946.

229. *Id.* at 947.

IV. Criminal Law

CRIMINAL LAW—RESTITUTION—GOVERNMENTAL AGENCY—DEPARTMENT OF PUBLIC WELFARE—Commonwealth v. Runion, 662 A.2d 617 (Pa. 1995)—The Pennsylvania Supreme Court held that governmental agencies are not "persons" under the Statutory Construction Act and thus are not "victims" for purposes of restitution for costs incurred on behalf of a public assistance recipient.

In *Commonwealth v. Runion*,[230] a welfare recipient was assaulted and hospitalized for injuries incurred.[231] The Department of Public Welfare (the "DPW") paid the welfare recipient's medical costs and subsequently filed a suit for restitution from the assailant.[232] The Court of Common Pleas of Dauphin County found for the DPW and granted restitution.[233] The superior court affirmed the trial court's conclusion that the DPW could be considered a victim for restitution purposes.[234]

The assailant argued to the supreme court that the DPW is not a victim within the meaning of section 1106 of the Pennsylvania Crimes Code (the "Crimes Code") and is, therefore, not entitled to restitution.[235] The supreme court found that the restitution statute, section 1106 of the Crimes Code, fails to indi-

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230. 662 A.2d 617 (Pa. 1995).

231. *Runion*, 662 A.2d at 618.

232. *Id.*

233. *Id.*

234. *Id.* The superior court, however, vacated the restitution order because the trial court failed to adequately assess the assailant's ability to pay restitution. *Id.*

235. *Id.* at 619. Section 1106 of the Pennsylvania Crimes Code states in pertinent part:

> (a) General rule.—Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender may be sentenced to make restitution in addition to the punishment prescribed therefor.
>
> . . . .
>
> (e) Restitution payments and records.—Restitution, when ordered by a judge, shall be made by the offender to the probation section of the county in which he was convicted according to the order of the court or, when ordered by a district justice, shall be made to the district justice. The probation section and the district justice shall maintain records of the restitution order and its satisfaction and shall forward to the victim the property or payments made pursuant to the restitution order.

18 PA. CONS. STAT. § 1106 (1990). Section 1106(h) of the Crimes Code further defines a victim as "[a]ny person, except an offender, who suffered injuries to his person or property as a direct result of the crime." *Id.* § 1106(h).

cate whether governmental agencies are included within the definition of "victim."[236] Because of the lack of guidance within the restitution statute, the supreme court relied on the Statutory Construction Act's definition of "person."[237] In recognizing that Pennsylvania courts have wrestled with the question of whether parties that are not direct victims of a crime are entitled to restitution, the supreme court found that none of the cases addressed the definitions section of the Statutory Construction Act that defines "person."[238]

A "person," under the Statutory Construction Act, includes "a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person."[239] Thus, based on the plain and ordinary meaning of person, the supreme court concluded that governmental agencies of the Commonwealth are not included within the definition of "person" under the Statutory Construction Act.[240] Despite the supreme court's recognition that the primary purpose of the restitution statute is the rehabilitation of an offender, the supreme court concluded that it is the responsibility of the legislature, not the courts, to include governmental agencies within the definition of "victim."[241]

Although governmental agencies typically incur significant expenses on behalf of injured welfare recipients, the supreme court's decision in *Runion* precludes governmental agencies from recovering such costs from offenders. By relying on two distinctly separate statutes, the *Runion* court reasoned that the preclusion of governmental agencies from the meaning of "persons" in one statute means that governmental agencies are excluded from the meaning of "victims" in another statute.

CRIMINAL LAW—CAPITAL SENTENCING—TRIAL COURT DISCRETION—CONSECUTIVE SENTENCES—Commonwealth v. Graham, 661 A.2d 1367 (Pa. 1995)—The Pennsylvania Supreme Court held that a trial court has no discretion to order a death sentence to be consecutive to any other sentences and that a death sentence is *sui juris* and stands independent from other sentencing punishments.

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236. *Runion*, 662 A.2d at 619.
237. *Id.* (quoting 1 PA. CONS. STAT. § 1991 (1975)).
238. *Id.* at 619-21.
239. *Id.* at 619 (quoting 1 PA. CONS. STAT. § 1991).
240. *Id.*
241. *Runion*, 662 A.2d at 621.

In *Commonwealth v. Graham*,[242] the Pennsylvania Supreme Court restricted the discretion of a trial court to impose a sentence that is concurrent with or consecutive to other sentences.[243] In *Graham*, the trial court adjudged the defendant, Harrison Graham ("Graham"), guilty on seven first degree murder counts.[244] The trial court imposed death sentences on six of the first degree murder counts consecutive to a life sentence that was imposed on the seventh first degree murder count.[245]

On direct appeal of the death sentences, the supreme court was confronted with the initial problem of the defendant filing a petition to dismiss the appeal.[246] The supreme court decided that the automatic review of death sentences is separate and distinct from the appellate rights of defendants.[247] The supreme court reasoned that the rules of appellate procedure require appeals in capital cases to begin even without the filing of a notice of appeal.[248]

After reviewing and affirming the trial court's judgments of death, despite the defendant's filing of a petition to dismiss the appeal, the supreme court addressed the validity of the trial court's imposition of the death sentences consecutive to the life sentence.[249] The court recognized that, in Pennsylvania, a sentencing court has discretion to impose sentences that are concurrent or consecutive to other sentences.[250] However, by relying primarily on the textual structure of the Sentencing Code, the supreme court ruled that a sentencing court has no discretion to impose death sentences consecutive to other sentences.[251]

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242. 661 A.2d 1367 (Pa. 1995).
243. *Graham*, 661 A.2d at 1364.
244. *Id.* at 1369.
245. *Id.* at 1371.
246. *Id.* at 1369.
247. *Id.*
248. *Graham*, 661 A.2d at 1369.
249. *Id.* at 1369-71.
250. *Id.* at 1373.
251. *Id.* at 1373-74. The supreme court noted that, generally, a sentencing court has discretion in imposing concurrent or consecutive sentences based on the Sentencing Code, 42 PA. CONS. STAT. § 9721(a) (1990), which provides:

> In determining the sentence to be imposed, the court shall, except where a mandatory minimum sentence is otherwise provided by law, consider and select one or more of the following alternatives, and may impose them consecutively or concurrently:
>
> (1) An order of probation.
> (2) A determination of guilt without further penalty.
> (3) Partial confinement.
> (4) Total confinement.
> (5) A fine.

42 PA. CONS. STAT. § 9721(a). However, the supreme court ruled that the provisions

Graham does not change a sentencing court's power to impose concurrent or consecutive sentences. *Graham* does, however, preclude death sentences from the types of sentences that may be imposed consecutively or concurrently.

CRIMINAL LAW—RESISTING ARREST—UNLAWFUL ARREST—PROBABLE CAUSE—AGGRAVATED ASSAULT—SELF DEFENSE—Commonwealth v. Biagini, 655 A.2d 492 (Pa. 1995)—The Pennsylvania Supreme Court held that a lack of probable cause in a police arrest prevents a conviction for the crime of resisting arrest because the underlying arrest is unlawful, and the unlawfulness of the underlying arrest does not entitle a defendant to physically resist the officers and does not preclude aggravated assault convictions. The supreme court further held that the right to physically resist is only triggered when a defendant uses self defense against an officer's use of excessive or deadly force.

In *Commonwealth v. Biagini*,[252] the Pennsylvania Supreme Court addressed the issue of whether a conviction for resisting arrest can be upheld when the underlying arrest is subsequently found to be unlawful for lack of probable cause.[253] During a routine police patrol, a police officer heard a disturbance and saw the defendant, Bruce Biagini ("Biagini"), stumble from an alley.[254] The officer approached Biagini and several other individuals to inquire about the disturbance.[255] Biagini returned to his home, refused to answer any more questions posed by the officer, and ordered the officer to leave his property.[256] The officer then informed Biagini that he was being arrested for public intoxication and disorderly conduct.[257] Biagini refused, a scuffle ensued, the officer was injured, and Biagini was subsequently arrested with the help of additional officers.[258] The trial court convicted Biagini of public intoxication, disorderly conduct, aggravated assault, resisting arrest, and other charges.[259]

The superior court overruled the trial court and held that the

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of § 9721(a) are inapplicable to a death sentence because the death penalty provisions are contained in Subchapter B of the Sentencing Code, while § 9721(a) is contained in Subchapter C. *Graham*, 661 A.2d at 1373.

252. 655 A.2d 492 (Pa. 1995).

253. *Biagini*, 655 A.2d at 493.

254. *Id.* at 494.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Biagini*, 655 A.2d at 494.

259. *Id.* Biagini was also convicted of possession of prohibited weapons and marijuana. *Id.*

officer did not have probable cause to arrest Biagini for either public intoxication or disorderly conduct.[260] Although the superior court held that the underlying arrests were unlawful, the court upheld the conviction for resisting arrest, concluding that Biagini possessed no right to resist an officer who was performing his duties.[261]

In a separate incident, which was subsequently consolidated with the Biagini incident for review by the supreme court, a police officer approached an area in which a narcotics sale was to take place.[262] When the officer approached an area where the defendant, Barry W., and another man were standing, the two men fled.[263] The officer ran after the men, a struggle ensued, the officer was injured, and Barry W. was subsequently arrested and convicted of aggravated assault, resisting arrest, and other charges.[264] The superior court held that the officer lacked probable cause for the arrest, reversed Barry W.'s conviction for resisting arrest, and affirmed Barry W.'s aggravated assault conviction.[265]

Because the superior court rendered two decisions that were inconsistent, Biagini's and Barry W.'s appeals were consolidated for review by the supreme court.[266] The essence of the defendants' argument was that a conviction for resisting arrest cannot be upheld when the underlying arrest is unlawful.[267] The supreme court, focusing on the language of the statute, found that the lawfulness of the underlying arrest is an essential element of the crime of resisting arrest.[268] Accepting the superior court's opinions in both cases that each arrest lacked probable cause, the supreme court reversed Biagini's conviction for resisting arrest and affirmed the reversal of Barry W.'s re-

260. *Id.* at 493, 495 (citing 18 PA. CONS. STAT. §§ 5503, 5505 (1990)). *See* Commonwealth v. Biagini, 627 A.2d 199 (Pa. Super. Ct. 1993), *aff'd in part, rev'd in part*, 655 A.2d 492 (Pa. 1995).

261. *Biagini*, 655 A.2d at 495.

262. *Id.*

263. *Id.*

264. *Id.* at 495-96. Barry W. was also convicted of simple assault and adjudicated delinquent. *Id.* at 496.

265. *Id.* at 496.

266. *Biagini*, 655 A.2d at 493.

267. *Id.* at 496.

268. *Id.* at 497 (citing 18 PA. CONS. STAT. § 5104 (1990)). A person commits the crime of resisting arrest if, "with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance." 18 PA. CONS. STAT. § 5104.

sisting arrest conviction.[269]

However, the supreme court ruled that the defendants had no right to physically resist the officers despite the unlawfulness of their arrests.[270] The supreme court reasoned that not only is physical resistance to an officer specifically precluded by law, but also physical resistance fosters a disorderly resolution of problems.[271] Because a lawful arrest is not an element of the crime of aggravated assault, the supreme court affirmed both defendants' convictions for aggravated assault.[272]

Finally, the supreme court ruled that Pennsylvania does not recognize a right to resist an arrest.[273] The only situation in which physical resistance may be justified is when a defendant uses self defense against an officer's use of excessive or deadly force.[274] Therefore, based on *Biagini*, an officer may engage in a clearly unlawful and unpredicated arrest and as long as the officer does not use excessive or deadly force, the arrestee is not entitled to physically resist. The arrestee may then be charged with aggravated assault for resisting that which was unlawfully inflicted.

CRIMINAL LAW—RECEIVING STOLEN PROPERTY—STOLEN REQUIREMENT—Commonwealth v. Stafford, 652 A.2d 297 (Pa. 1995)—The Pennsylvania Supreme Court held that there is no requirement that goods be stolen in order for a defendant to be convicted of the crime of receiving stolen property.

In *Commonwealth v. Stafford*,[275] the Pennsylvania Supreme Court was confronted with the issue of whether property must actually be stolen in order for a defendant to be convicted of the crime of receiving stolen property.[276] In *Stafford*, a jury convicted the defendant of the crime and the superior court reversed and contended that the jury must be informed that the Commonwealth must prove that the property was actually sto-

269. *Biagini*, 655 A.2d at 497.

270. *Id.*

271. *Id.* at 497-98 (citing 18 PA. CONS. STAT. § 505(b)(1)(i) (1990)). Section 505(b)(1)(i) provides: "The use of force is not justifiable to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful." 18 PA. CONS. STAT. § 505(b)(1)(i).

272. *Biagini*, 655 A.2d at 498 (citing 18 PA. CONS. STAT. §§ 2702(a)(3), 505(b)(1)(i) (1990)).

273. *Id.* at 499.

274. *Id.* (citing Commonwealth v. French, 611 A.2d 175 (Pa. 1992)).

275. 652 A.2d 297 (Pa. 1995).

276. *Stafford*, 652 A.2d at 297.

len.[277]

The supreme court disagreed with the superior court's conclusion.[278] The supreme court acknowledged that, before June 6, 1973, the statute proscribing receiving stolen property required that goods were actually stolen.[279] However, the supreme court recognized that the "stolen" requirement was eliminated in the present statute.[280] The statute merely provides that: "A person is guilty of theft if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner."[281] Therefore, the supreme court decided that property need not actually be stolen for a defendant to be convicted of the crime of receiving stolen property.[282]

Stafford expands the permissible grounds for a charge and conviction of receiving stolen property. When a person possesses property that the person believes to have been stolen, such person may be convicted of receiving stolen property despite the subsequent discovery that the property was not stolen.

CRIMINAL LAW—AGGRAVATED ASSAULT—UNDERCOVER POLICE OFFICERS—Commonwealth v. Flemings, 652 A.2d 1282 (Pa. 1995)—The Pennsylvania Supreme Court held that knowledge of a victim's identity as a police officer is not an element of aggravated assault.

Commonwealth v. Flemings[283] involved two undercover police officers who were posing as drug purchasers.[284] While attempting to sell the officers illegal drugs, the defendant noticed a pistol in the possession of one of the undercover officers.[285] The defendant grabbed the pistol, pointed it at the officers, then ran away.[286] The defendant was subsequently arrested and charged with possession of a controlled substance and aggravated assault.[287]

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277. *Id.*
278. *Id.*
279. *Id.* at 298.
280. *Id.*
281. 18 PA. CONS. STAT. § 3925 (1990).
282. *Stafford*, 652 A.2d at 298.
283. 652 A.2d 1282 (Pa. 1995).
284. *Flemings*, 652 A.2d at 1283.
285. *Id.*
286. *Id.*
287. *Id.* at 1282. The defendant was also charged with conspiracy, theft, possession of a firearm without a license, and reckless endangerment. *Id.*

The jury found the defendant guilty on each count and the superior court reversed because it concluded that the defendant's knowledge of the victims' identities as police officers is a material element of aggravated assault under section 2702(a)(3) of the Pennsylvania Crimes Code.[288]

In deciding that a defendant's knowledge of a victim's identity as a police officer is not an element of the crime of aggravated assault, the Pennsylvania Supreme Court relied on a United States Supreme Court decision that reached the same conclusion regarding a similar federal statute.[289] The Pennsylvania Supreme Court further reasoned that to make the crime of aggravated assault contingent on a defendant's knowledge of the victim's identity would divest undercover officers of their protection.[290] The supreme court concluded that wrongdoers take their victims as found.[291] The court held that a defendant's knowledge of an officer's identity is relevant only in those rare instances when an officer fails to reveal his official status and engages in conduct that could reasonably be viewed as an unlawful use of force.[292]

Flemings enlarges the scope of aggravated assault convictions. When charged with aggravated assault, a defendant can only use the lack of knowledge of a police officer's identity as a defense when the officer engages in an unlawful use of force.

CRIMINAL LAW—DISTRICT ATTORNEY PROSECUTORIAL POWER—POLICE AUTHORITY—NONPROSECUTION AGREEMENT—Commonwealth v. Stipetich, 652 A.2d 1294 (Pa. 1995)—The Pennsylvania Supreme Court held that a county district attorney's power to prosecute is not restricted by a nonprosecution agreement between police and drug offenders, and police officers do not have the authority to dictate whether a county district attorney can file charges.

In *Commonwealth v. Stipetich*,[293] the Pennsylvania Supreme Court addressed the validity of a nonprosecution agreement

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288. *Id.* at 1283. The crime of aggravated assault is proscribed in 18 PA. CONS. STAT § 2702(a)(3) (1990), which provides: "A person is guilty of aggravated assault if he . . . attempts to cause or intentionally or knowingly causes bodily injury to a police officer . . . in the performance of duty." 18 PA. CONS. STAT. § 2702(a)(3).

289. *Flemings*, 652 A.2d at 1284. *See* United States v. Feola, 420 U.S. 671 (1975) (holding that knowledge of a victim's identity as a federal officer is not an element of the crime of assault of a federal officer).

290. *Flemings*, 652 A.2d at 1285.

291. *Id.* (citing *Feola*, 420 U.S. at 684-85).

292. *Id.*

293. 652 A.2d 1294 (Pa. 1995).

between police officers and individuals possessing drug substances.[294] In *Stipetich*, police officers, pursuant to a warranted search, discovered drug substances in the defendants' home.[295] The police agreed not to file criminal charges against the defendants if the defendants revealed the source of the illegal drugs.[296] The defendants satisfied their part of the agreement by providing the police with answers to all questions posed.[297] However, the county district attorney still filed charges against the defendants for drug possession.[298]

The defendants filed a motion to dismiss and cited the nonprosecution agreement with the police.[299] The court of common pleas granted the motion to dismiss, and the superior court affirmed.[300] The Pennsylvania Supreme Court reversed.[301]

The supreme court began its analysis by acknowledging the well-established principle that district attorneys possess wide discretion in deciding whether to file charges.[302] While recognizing that police officers have discretion in deciding whether an arrest, citation, or a warrant is necessary, the supreme court held that police have no power to enter into agreements that restrict a district attorney's power to prosecute.[303] The supreme court further found that to provide police with the authority to restrict the district attorney in prosecuting would clearly infringe on the powers granted to the district attorney by the constitution, legislature, and case law.[304]

The supreme court concluded that the nonprosecution agreement was invalid because the district attorney did not consent to the agreement.[305] The supreme court further concluded that police officers do not have the power to bind a district attorney to not file criminal charges.[306]

Stipetich effectively eliminates the validity of nonprosecution agreements between police officers and individuals subject to possible investigation. Without the district attorney's consent, an alleged offender may comply with all the provisions in a

294. *Stipetich*, 652 A.2d at 1294.
295. *Id.*
296. *Id.*
297. *Id.* at 1295.
298. *Id.*
299. *Stipetich*, 652 A.2d at 1295.
300. *Id.*
301. *Id.*
302. *Id.* (citing Commonwealth v. DiPasquale, 246 A.2d 430 (Pa. 1968)).
303. *Id.*
304. *Stipetich*, 652 A.2d at 1295.
305. *Id.*
306. *Id.*

nonprosecution agreement and still be subject to subsequent prosecution.

CRIMINAL LAW—CONSPIRACY—JOINT TRIAL—ACQUITTAL OF CO-CONSPIRATORS—Commonwealth v. Campbell, 651 A.2d 1096 (Pa. 1994)—The Pennsylvania Supreme Court held that a defendant may be convicted of the crime of conspiracy even though the sole alleged co-conspirator was acquitted of conspiracy during a joint trial with the defendant.

In *Commonwealth v. Campbell*,[307] the Pennsylvania Supreme Court was confronted with an issue of first impression when a jury returned inconsistent verdicts in a joint trial against two alleged co-conspirators.[308] In *Campbell*, the defendant and an alleged co-conspirator were charged with criminal conspiracy involving the sale of controlled substances.[309] In the joint trial of the two alleged co-conspirators, the jury questioned the court whether, "[i]n the event the jury has reasonable doubt as to the identity of one co-conspirator, may the other co-conspirator be guilty of conspiracy?"[310] The trial court responded that the jury may find both, none, or only one of the defendants guilty.[311] The jury then found the defendant guilty of conspiracy and acquitted the alleged co-conspirator of all charges.[312]

On appeal, the defendant asserted that a joint trial involving conspiracy charges requires a jury to return consistent verdicts.[313] The supreme court discussed two cases in which different verdicts were reached in separate trials of two alleged co-conspirators and determined that the rationale of the two cases was applicable to different verdicts in a joint trial of co-conspirators.[314] The court thereafter concluded that a jury need not return consistent verdicts in a joint trial against co-conspira-

307. 651 A.2d 1096 (Pa. 1994).
308. *Campbell*, 651 A.2d at 1097.
309. *Id.*
310. *Id.* at 1098.
311. *Id.*
312. *Id.*
313. *Campbell*, 651 A.2d at 1098.
314. *Id.* at 1098-99. The first case that the supreme court discussed was Commonwealth v. Byrd, 417 A.2d 173 (Pa. 1980), in which the court concluded that a convicted conspirator is not entitled to a reversal of conviction despite the subsequent acquittal of a sole alleged co-conspirator in a separate trial. *Id.* at 1098 (citing *Byrd*). The second case which the supreme court discussed was Commonwealth v. Phillips, 601 A.2d 816 (Pa. Super. Ct. 1992), in which the court held that a defendant is not entitled to an acquittal of conspiracy charges despite the previous acquittal of a sole alleged co-conspirator. *Id.* at 1099 (citing *Phillips*).

tors.[315]

The court further supported its conclusion by discussing decisions by the Pennsylvania Supreme Court and the United States Supreme Court.[316] In *Commonwealth v. Brown*,[317] the Pennsylvania Supreme Court held that an accomplice could be found guilty of a crime despite the acquittal of an alleged principal.[318] In *Commonwealth v. Carter*,[319] the Pennsylvania Supreme Court discussed the concept of consistency in verdicts and stated that the long-standing rule in Pennsylvania has been that criminal cases do not require consistency in verdicts.[320] In *Dunn v. United States*,[321] the United States Supreme Court held that a defendant who is convicted on one criminal count is not entitled to challenge the conviction despite the inconsistency of the jury's verdict on another count.[322] And, in *United States v. Powell*,[323] the United States Supreme Court held that a conviction of federal felonies could not be attacked despite the jury's acquittal of the defendant on the predicate felonies.[324] The Pennsylvania Supreme Court acknowledged that *Dunn* and *Powell* involved inconsistent verdicts against a single defendant who was charged with several counts.[325] However, the Pennsylvania Supreme Court extended the *Dunn* and *Powell* rationales to inconsistent verdicts against defendants in a joint trial because the jury, in both cases, was confronted with similar information at the same trial and delivered inconsistent verdicts.[326]

In conclusion, the Pennsylvania Supreme Court held that the trial judge did not commit an error when the jury was provided with the instruction that it could convict one conspirator while acquitting the other conspirator in a joint trial.[327]

By analyzing and extending the rationales of several Pennsylvania Supreme Court and United States Supreme Court cases, the *Campbell* court eliminated any previous requirement for consistent verdicts in joint trials of co-conspirators. A defendant may be convicted of conspiracy despite the acquittal of a sole

315. *Id.* at 1098.
316. *Id.* at 1099-1101.
317. 375 A.2d 331 (Pa. 1975).
318. *Brown*, 375 A.2d at 333-36.
319. 282 A.2d 375 (Pa. 1971).
320. *Carter*, 282 A.2d at 376-77.
321. 284 U.S. 390 (1932).
322. *Dunn*, 284 U.S. at 393.
323. 469 U.S. 57 (1984).
324. *Powell*, 469 U.S. at 63-69.
325. *Campbell*, 651 A.2d at 1100.
326. *Id.* at 1101.
327. *Id.*

alleged co-conspirator in a joint trial of the two alleged conspirators.

CRIMINAL LAW—ATTORNEY-CLIENT PRIVILEGE—INCULPATORY STATEMENT—ANTICIPATED CHARGES—Commonwealth v. Mrozek, 657 A.2d 997 (Pa. Super. Ct. 1995)—The Pennsylvania Superior Court held that a defendant's inculpatory statement to an attorney's secretary is within the scope of the attorney-client privilege despite the statement being made before charges were filed and before the actual establishment of a formal attorney-client relationship.

In *Commonwealth v. Mrozek*,[328] the Pennsylvania Superior Court addressed the scope of the attorney-client privilege when a communication is made to someone other than an attorney and when a formal attorney-client relationship has not yet been established.[329] In *Mrozek*, the defendant phoned an attorney who had previously represented the defendant on other charges.[330] The attorney's secretary repeatedly informed the defendant that the attorney was not available to talk to the defendant.[331] The defendant then responded by stating: "Honey, I don't think you understand. I've just committed a homicide. I have to talk with [the attorney]."[332] The attorney then answered the phone and subsequently accompanied the defendant during questioning by the district attorney.[333]

The defendant was formally charged with homicide, and the district attorney subpoenaed the attorney's secretary to testify concerning the defendant's inculpatory statement.[334] The defendant filed a motion to suppress the inculpatory statement, citing the attorney-client privilege.[335] The trial court ruled in favor of the district attorney, and the defendant was subsequently convicted of murder in the first degree.[336]

The superior court ruled that the trial court erred when it did not suppress the secretary's testimony concerning the defendant's inculpatory statement.[337] The court held that communications to an attorney's secretary are covered by the attor-

328. 657 A.2d 997 (Pa. Super. Ct. 1995).
329. *Mrozek*, 657 A.2d at 998, 999.
330. *Id.* at 998.
331. *Id.*
332. *Id.*
333. *Id.*
334. *Mrozek*, 657 A.2d at 998.
335. *Id.*
336. *Id.*
337. *Id.* at 997.

ney-client privilege because a secretary is an attorney's subordinate.[338] The court further found that initial communications between an attorney and a potential client are privileged.[339]

Thus, the court concluded that the attorney-client privilege extends not only to communications with an attorney but also to communications with an attorney's employees and agents.[340] The court further concluded that the attorney-client privilege encompasses initial communications made for the purpose of retaining the services of counsel.[341]

Mrozek expands the protection afforded to a defendant by precluding statements made prior to the creation of an attorney-client relationship and statements made with an attorney's employees and agents from being used against the defendant at trial.

CRIMINAL LAW—FOURTH AMENDMENT—UNREASONABLE SEARCHES AND SEIZURES—PARDON AND PAROLE—CONSENT FORM—Commonwealth v. Walter, 655 A.2d 554 (Pa. Super. Ct. 1995)—The Pennsylvania Superior Court held that a consent form that is signed as a condition of obtaining parole and that authorizes the warrantless search of a parolee's person and property is violative of the parolee's Fourth Amendment rights.

In *Commonwealth v. Walter*,[342] a parolee signed a standard parole form that expressly gave written consent to the warrantless search of his person and property.[343] Based on a robbery lead, a warrantless search was conducted on the parolee's property that subsequently led to a warranted search and arrest of the parolee.[344] The parolee filed a motion to suppress the evidence seized at his property, and the trial court granted the motion.[345] On appeal from the order granting the motion to suppress, the superior court began its analysis with the assertion

338. *Id.* at 998, 999.
339. *Mrozek*, 657 A.2d at 999.
340. *Id.* at 1000.
341. *Id.*
342. 655 A.2d 554 (Pa. Super. Ct. 1995).
343. *Walter*, 655 A.2d at 556. The parole form stated:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

Id.
344. *Id.* at 555.
345. *Id.*

that parolees possess a Fourth Amendment right against unreasonable searches and seizures.[346] The superior court cemented its proposition by citing the Pennsylvania Supreme Court's decision in *Commonwealth v. Pickron*.[347] In *Pickron*, the Pennsylvania Supreme Court held that "the Fourth Amendment prohibits the warrantless search of probationers or parolee's residences based upon reasonable suspicion without the consent of the owner or without a statutory or regulatory framework governing the search."[348]

The superior court held that the consent form in *Walter* was inconsistent with the *Pickron* case.[349] First, the superior court found that the parolee had no real choice in signing the consent form because the parolee either had to sign the consent form or he would not be entitled to parole.[350] Second, the superior court found that the consent form contained no safeguards of the parolee's Fourth Amendment rights because the form provided no criteria to establish when a warrantless search could be conducted.[351]

Because the consent form gave the parolee no rights and provided him with no Fourth Amendment protection, the superior court concluded that the consent form was inconsistent with the parolee's constitutional rights.[352]

By inviting the broad constitutional protections of the Fourth Amendment, the *Walter* court invalidated consent forms that authorize a warrantless search of a parolee's person and property. For a consent form to be valid under *Walter*, the consent form must afford the parolee with an opportunity to sign or refuse to sign, and the consent form must provide adequate Fourth Amendment protections against warrantless searches.

CRIMINAL LAW—AGGRAVATED ASSAULT—INTENT—Commonwealth v. Lopez, 654 A.2d 1150 (Pa. Super. Ct. 1995)—The Pennsylvania Superior Court held that a person who fires gun shots into an empty residence can be convicted of aggravated assault if the person possesses the intent to cause physical injury, even though actual injury is impossible.

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346. *Id.* at 555-56.
347. *Id.* at 556 (citing Commonwealth v. Pickron, 634 A.2d 1093 (Pa. 1993)).
348. *Pickron*, 634 A.2d at 1098.
349. *Walter*, 655 A.2d at 556-57.
350. *Id.* at 556.
351. *Id.* at 557.
352. *Id.*

In *Commonwealth v. Lopez*,[353] the Pennsylvania Superior Court was confronted with the issue of whether an aggravated assault charge[354] can withstand a finding that actual injury to the intended victim was impossible.[355] In *Lopez*, the defendant told his ex-girlfriend that he would kill her if he possessed a weapon.[356] After damaging his ex-girlfriend's son's car, the defendant stated that "the war will continue."[357] The defendant then drove away while his ex-girlfriend stood outside of her home.[358] After a short time, the defendant returned to his ex-girlfriend's home and shot eight bullets at the front door.[359] Unknown to the defendant, his ex-girlfriend went to hide in a neighbor's home and was not inside her home when the defendant shot at the front door.[360]

At a preliminary hearing, a municipal court judge ruled that a prima facie case of aggravated assault had been established against the defendant.[361] The court of common pleas found that the aggravated assault charge could not stand because of the absence of a showing that the defendant intended to cause physical injury because his intended victim was not inside her residence.[362] On appeal, the Pennsylvania Superior Court found that a misunderstanding of a situation, which renders the carrying out of an attempted crime impossible, is not a defense to the attempted crime.[363] The court held that the Commonwealth bears the burden of proving that the defendant intended to cause physical injury when the defendant's conduct did not cause any physical injury.[364]

Because the defendant threatened his ex-girlfriend, told her he would continue their "war," and returned a short time later to fire bullets into her home, the superior court ruled that a reasonable jury could find that the defendant intended to cause physical injury.[365] In reversing and remanding the case for trial, the superior court concluded that a defendant's state of mind, not the presence or absence of an intended victim, is the critical

353. 654 A.2d 1150 (Pa. Super. Ct. 1995).
354. *See* 18 PA. CONS. STAT. § 2702 (Supp. 1995).
355. *Lopez*, 654 A.2d at 1152.
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Lopez*, 654 A.2d at 1152.
361. *Id.*
362. *Id.* at 1153.
363. *Id.* at 1154 (citing 18 PA. CONS. STAT. § 901(b) (1990)).
364. *Id.*
365. *Lopez*, 654 A.2d at 1155.

factor in determining whether an aggravated assault was committed.[366]

Lopez emphasized that the crime of aggravated assault focuses on the defendant's intent rather than the defendant's ability to inflict physical injury. Thus, neither physical injury nor the ability to cause injury is necessary for a conviction of aggravated assault.

V. Domestic Relations

DOMESTIC RELATIONS—CUSTODY DETERMINATIONS—PARENTS AND THIRD PARTIES—SIGNIFICANT FACTOR STANDARD—Rowles v. Rowles, 668 A.2d 126 (Pa. 1995)—The Supreme Court of Pennsylvania held that the standard to be applied in custody disputes between parents and third parties is the "significant factor" standard, which abandons the previous presumption of parental custody standard.

The Supreme Court of Pennsylvania held in *Rowles v. Rowles*[367] that the standard to be applied in custody disputes between parents and third parties is the "significant factor" standard and that parents no longer have a prima facie right to custody as against third parties.[368]

In *Rowles,* Michelle (the "mother") and David (the "father") (collectively the "parents") and their two children resided in the home of Blair and Julia Rowles (the "grandparents").[369] The parents began to experience marital difficulties and subsequently moved out of the home of the grandparents.[370] The grandparents were given physical custody of the two children.[371]

One and one-half years later, the parents initiated divorce proceedings.[372] The parents executed an agreement that bestowed guardianship rights on the grandparents and also granted the grandparents physical custody of the children.[373]

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366. *Id.*

367. 668 A.2d 126 (Pa. 1995).

368. *Rowles*, 668 A.2d at 128.

369. *Id.* The children were Edward, age 7, and Michelle, age 5, at the time of this proceeding. *Id.*

370. *Id.* The marital discord developed two months after the birth of Michelle. *Id.*

371. *Id.*

372. *Id.* Divorce proceedings were initiated in February of 1992. *Id.*

373. *Rowles,* 668 A.2d at 127. In May of 1992, the agreement became part of

Six months after the guardianship arrangements were finalized, the mother petitioned the trial court to obtain physical custody of the two children.[374] The trial court determined that physical custody should remain with the grandparents.[375] The trial court's decision was affirmed by the Superior Court of Pennsylvania.[376]

The Supreme Court of Pennsylvania granted allocatur[377] to review the legal standard appropriate for disputes involving custody between parents and third parties.[378] The court also addressed the application of this standard to the instant case.[379]

The first issue addressed by the court was whether the standard applied by the trial court was the appropriate standard for custody disputes between parents and third parties.[380] The trial court applied the standard announced in *Ellerbe v. Hooks*.[381]

In *Ellerbe,* the supreme court was faced with a custody dispute between a parent and a third party.[382] The supreme court held that there is a prima facie presumption that custody should be awarded to parents, except in situations where there is a clear indication that custody should be awarded to a third party.[383] In *Ellerbe,* Justice Flaherty, joined by Chief Justice

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the divorce decree between the parents. *Id.*

374. *Id.*

375. *Id.*

376. *Id. See* Rowles v. Rowles, 653 A.2d 1309 (Pa. Super. Ct. 1994) (holding that the decision of the trial court concerning the retention of physical custody by the grandparents of the two children should be affirmed), *rev'd,* 668 A.2d 126 (Pa. 1995).

377. Allocatur is defined as "[a] word . . . used to denote that a writ or order was allowed." BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

378. *Rowles*, 668 A.2d at 127.

379. *Id.*

380. *Id.*

381. 416 A.2d 512 (Pa. 1980) (holding that parents have a prima facie right to custody of their children as against third parties, however, this is not a conclusive presumption).

382. *Ellerbe,* 416 A.2d at 513.

383. *Id.* at 513-14. The court stated:

> [P]arents have a "prima facie right to custody," which "may be forfeited if convincing reasons appear that the best interests of the child will be served by awarding custody to someone else." . . . [T]he Superior Court, through Judge Spaeth, articulated the following approach:
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> > "When the judge is hearing a dispute between the parents, or a parent, and a third party, . . . [t]he question still is, what is in the child's best interest?" However, the parties do not start out even; the parents have a "prima facie right to custody," which will be forfeited only if "convincing reasons" appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents' side.
>
> We agree that this approach is appropriate. Clearly these principles do

Nix, concurred in the opinion of the court, but questioned the prima facie presumption that parents have a right to custody over third parties.[384]

In *Rowles*, the supreme court recognized the wisdom of the concurring opinion in *Ellerbe* and therefore abandoned the presumption of parental custody and replaced it with a "significant factor" standard.[385] This standard includes the physical, mental and emotional factors associated with the well-being of a child.[386]

The court then addressed the facts of *Rowles* in relationship to the new "significant factor" standard.[387] The court recognized

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not preclude an award of custody to the non-parent. Rather they simply instruct the hearing judge that the non-parent bears the burden of production and the burden of persuasion and that the non-parent's burden is heavy.

. . . .

Thus where circumstances do not clearly indicate the appropriateness of awarding custody to a non-parent, we believe the less intrusive and hence the proper course is to award custody to the parent or parents.

Id.

384. *Id.* at 516 (Flaherty, J., concurring). Justice Flaherty's opinion addressed the hazards associated with the presumption. *Id.* Justice Flaherty stated:

In *Commonwealth ex rel. Spriggs v. Carson* [citation omitted] where we overruled the "tender years" presumption that custody should be awarded to mothers rather than fathers, we stated: "Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of "presumptions." Instead, we believe that our courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case before the Court." The same reasoning should apply where the custody dispute is between parents and third parties. . . . [T]he underlying tenor of the "presumption" reflects an archaic concept that children are proprietary assets of parents. Serious question may be posed with respect to the soundness of the apriorism that mere biological relationship assures solicitude, care, devotion, and love for one's offspring . . . . [W]here a third party better fulfills these needs, or where other circumstances indicate third party custody to be preferable, the courts, when exercising judgment as to a child's welfare, should not be restrained solely by a presumption.

. . . .

[The majority's] approach should be replaced with a rule which would simplify and clarify application of the best interest standard. By clearly eliminating the presumption per se, and mandating that custody be determined by a preponderance of evidence, weighing parenthood as a strong factor for consideration, custody proceedings would be disentangled from the burden of applying a presumption that merely beclouds the ultimate concern in these cases: the determination of what affiliation will best serve the child's interests, including physical, emotional, intellectual, moral, and spiritual well-being.

Id. at 516-17.

385. *Rowles*, 668 A.2d at 128. The court indicated that there should be no single factor that is afforded greater weight. *Id.* Courts must consider all relevant facts, including "the physical, emotional, intellectual, moral, and spiritual well-being of a child." *Id.*

386. *Id.*

387. *Id.*

that the trial court examined the admirable qualities of the grandparents, but neglected to equally examine the qualities of the mother and her relationship to the children.[388] The mother, as noted by the supreme court, had daily contact with her children and was also a stabilizing factor for the children.[389] The supreme court concluded that the trial court and the superior court attached a disproportionate amount of weight to the grandparents' claim of stability and ignored the mother's participation in the lives of the children.[390]

In conclusion, the supreme court indicated that as to the facts of this case, the parental relationship certainly outweighed the other factors.[391] In so concluding, the supreme court reversed the decision of the superior court.[392]

The supreme court established a new "significant factor" standard for the determination of custody as between parents and third parties. The court delineated several factors that should be treated equally in making a determination of custody. However, the court focused on the maternal relationship with children and seemingly ignored those positive factors of equal weight associated with grandparents. Therefore, in essence, the supreme court has also attributed a disproportionate amount of weight to certain factors.

DOMESTIC RELATIONS—EDUCATIONAL SUPPORT—Curtis v. Kline, 666 A.2d 265 (Pa. 1995)—The Pennsylvania Supreme Court held that a statute providing for postsecondary educational child support violates the Equal Protection Clause of the Fourteenth Amendment and Pennsylvania's Constitution.

In March of 1993, Philip Kline ("Kline") filed a petition to terminate his support obligation to his daughter, Amber, and his son, Jason, both college students.[393] In support of the petition, Kline contested the constitutionality of the postsecondary educational support provisions of Act 62 of 1993 (the "Act").[394] The

388. *Id.* The trial court indicated that the grandparents were physically and mentally fit and provided the necessary love, affection and stability needed by the children. *Id.*

389. *Id.*

390. *Rowles*, 668 A.2d at 130.

391. *Id.*

392. *Id.*

393. Curtis v. Kline, 666 A.2d 265, 267 (Pa. 1995).

394. *Curtis*, 666 A.2d at 267. The Act provides that: "[A] court may order either or both parents who are separated, divorced, unmarried or otherwise subject to an existing support obligation to provide equitably for educational costs of their child whether an application for this support is made before or after the child has

trial court granted the petition to terminate support, and the supreme court affirmed on the grounds that the Act violated the Fourteenth Amendment's Equal Protection Clause and article I, section 26 of the Pennsylvania Constitution.[395]

Preliminarily, the court explained that the legislature may make classifications among citizens that are not arbitrary, and are reasonably related to the legislation's purpose.[396] The court noted that a court's review of a classification must first determine that the distinction is genuine and not artificial.[397] In addition, the court reasoned that a court must determine the relative importance of the classification and apply a differing standard of review depending upon that importance.[398] Specifically, the court opined, a classification involving a suspect class or a fundamental right must undergo strict scrutiny and serve a compelling governmental purpose, while classifications dealing with an "important" right or "sensitive" classification are subjected to a heightened scrutiny and must serve an "important" governmental purpose, and finally, all other kinds of classifications are upheld if they are rationally related to a legitimate governmental purpose.[399]

The court then determined that the classification did not involve any suspect or sensitive classifications or fundamental or important rights, and was therefore subject to a rational basis test.[400] The rational basis test proceeds in two parts: 1) is there a legitimate state interest or public value, and if so, 2) is the classification rationally related to that purpose?[401]

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reached 18 years of age." 23 PA. CONS. STAT. § 4327(a) (Supp. 1995). The Act was promulgated in response to the court's decision in Blue v. Blue, 616 A.2d 628 (Pa. 1992) (holding that there is no duty to provide college educational support).

395. *Curtis*, 666 A.2d at 270. The Fourteenth Amendment of the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws." U.S. CONST. amend. XIV. The court noted that "we would apply the same analysis and reach the same result under our state constitution," even though Kline did not raise a state constitutional claim. *Id.* at 267 n.1. Article I, section 26 of the Pennsylvania Constitution provides: "[N]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." PA. CONST. art I, § 26.

396. *Curtis*, 666 A.2d at 268 (citing Commonwealth v. Parker White Metal Co., 515 A.2d 1358 (Pa. 1986)).

397. *Id.* (citing Equitable Credit and Discount Co. v. Geier, 21 A.2d 53 (Pa. 1941)).

398. *Id.*

399. *Id.* (citing Smith v. City of Philadelphia, 516 A.2d 306 (Pa. 1986)).

400. *Id.* at 268-69.

401. *Curtis*, 666 A.2d at 269 (citing Plowman v. Commonwealth, 635 A.2d 124 (Pa. 1993)).

The court determined that the legislation distinguished between children of intact families and children of divorced, separated, or unmarried families.[402] Specifically, the court held that the classification was arbitrary because there was no rational basis for providing only children of non-intact families with a means of compelling parental support for college.[403] The court distinguished a contrary decision by the New Hampshire Supreme Court by stating that the New Hampshire court based its decision on its own state constitution and a classification that focussed not on children, but on parents.[404]

In a dissenting opinion, Justice Montemuro criticized the court for finding that children of divorced parents are on equal footing with children of intact families in reference to financing college education, and additionally for focusing the equal protection analysis on the children, rather than on the parents.[405] Specifically, the dissent argued that many divorced parents are "determined" to avoid postsecondary educational support, even when the non-custodial parent has sufficient resources to do so.[406] In addition, the dissent noted that most children of intact families continue to receive post-majority support, further legitimizing the classification.[407]

The dissent also argued that because the classification is based on unequal treatment of children, the Kline's standing to bring the claim was questionable.[408] In addition, the dissent noted that the majority distinguished the New Hampshire Supreme Court's decision that similar legislation did not violate equal protection by stating that the Pennsylvania statute focuses not on parents, but on children.[409] The dissent pointed out that the legislative history of both states' legislation was the same, there was no statutory language indicating a focus on children, and that all child support legislation distinguishes between children of intact families and children of divorced or separated families.[410]

The court's analysis was flawed because it analyzed the classi-

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402. *Id.*
403. *Id.* at 270.
404. *Id.* (citing LeClair v. LeClair, 624 A.2d 1350 (N.H. 1993)).
405. *Id.* at 271 (Montemuro, J., dissenting).
406. *Curtis*, 666 A.2d at 272 (citing Childers v. Childers, 575 P.2d 201 (Wash. 1978) and L. WEITZMAN, THE DIVORCE REVOLUTION 278 (1985)).
407. *Id.* at 273 (Montemuro, J., dissenting) (citing R. Washburn, *Post-Majority Support: Oh Dad, Poor Dad*, 44 TEMPLE L.Q. 319, 329 n.55 (1971)).
408. *Id.* at 273 n.5.
409. *Id.* at 270.
410. *Id.* at 272 n.3.

fication of children, rather than the classification of parents. The court failed to protect its most vulnerable citizens in a time when many forms of financial aid are at risk, making post-secondary education impossible for many.

DOMESTIC RELATIONS—DIVORCE—EQUITABLE DISTRIBUTION—Butler v. Butler, 663 A.2d 148 (Pa. 1995)—The Pennsylvania Supreme Court held that the goodwill and/or going concern value of a spouse's business is only one factor to consider in valuing the business for equitable distribution purposes.

In December of 1984, Carol and Leon Butler separated.[411] They were divorced in 1988 and a master was appointed to resolve outstanding economic issues.[412] The parties disputed the value of Mr. Butler's business interest for purposes of equitable distribution of the marital property.[413]

Mr. Butler had a partnership interest in an accounting firm where his employment was governed by the terms of a shareholder agreement.[414] The agreement provided for a mandatory sale of Mr. Butler's shares to the corporation at a price of $10 per share in the event of voluntary termination, loss of license, or permanent disability.[415] Further, the agreement provided that when a shareholder dies, his or her shares would be purchased from the personal representative for $100,000, to be paid for with a term life insurance policy on the life of the partner.[416]

Mr. Butler argued that his interest in the business was fixed by the terms of the shareholder agreement at $2,450.[417] Mrs. Butler, however, presented expert testimony that the going concern and/or goodwill value of the partnership was close to $500,000.[418] The expert disagreed with Mr. Butler's assessment and stated that the shareholder's agreement indicated a value of $300,000, the value of the term life insurance on the three partners.[419] The master then averaged what he saw as the value assigned by the shareholder agreement with the value assigned by Mrs. Butler's expert.[420]

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411. Butler v. Butler, 663 A.2d 148, 150 (Pa. 1995).
412. *Butler*, 663 A.2d at 150.
413. *Id.*
414. *Id.*
415. *Id.* The sale would total $2,450. *Id.*
416. *Id.*
417. *Butler*, 663 A.2d at 151.
418. *Id.*
419. *Id.*
420. *Id.*

On appeal, Mr. Butler argued first that the value of his interest was defined by the shareholder agreement, and alternatively that the going concern and/or goodwill value of the business should not be included in the total value for equitable distribution purposes.[421]

First, the supreme court held that the terms of the shareholder agreement were not determinative, but rather, the buy/sell agreement was only one factor in valuing the interest.[422] The court then concluded that because the terms of Mr. Butler's shareholder agreement were fixed and did not show the present worth of the firm, the agreement itself was not determinative on the issue of value.[423]

Second, the court held that the lower court erred when it accounted for goodwill in the valuation of the business.[424] The court held that the nature of the goodwill must first be determined.[425] If the goodwill is personal in nature, and not the goodwill of the business in general, it is inappropriate to be considered in equitable distribution.[426] Specifically, personal goodwill reflects the capability of earning future income, and future income is not to be considered in equitable distribution.[427]

In this case the record showed that Mr. Butler's clients were his responsibility, and that they identified not with the firm, but with Mr. Butler in particular.[428] The goodwill, then, was inalienable to Mr. Butler and could not be subjected to equitable distribution.[429] Thus, the court remanded the case for a determination of the value of the business.[430]

The court's outline of important factors in the valuation of a business—capital accounts, accounts receivable, work in progress, appreciation and goodwill less accounts payable and other liabilities—provide important guidance for this issue.[431] The majority's distinction between this case and *McCabe*, although criticized by the dissent, is an important one as well. Shareholder agreements are designed to define the rights of the share-

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421. *Id.* at 152.
422. *Butler*, 663 A.2d at 154 (distinguishing McCabe v. McCabe, 575 A.2d 87 (Pa. 1990)).
423. *Id.* at 155.
424. *Id.* (citing Stern v. Stern, 331 A.2d 257 (N.J. 1975)).
425. *Id.*
426. *Id.* at 156.
427. *Butler*, 663 A.2d at 156 (citing Hodge v. Hodge, 520 A.2d 15 (Pa. 1986)).
428. *Id.*
429. *Id.*
430. *Id.* at 157.
431. *Id.* at 154 (citing favorably Stern v. Stern, 331 A.2d 257 (N.J. 1975)).

holders—not their spouses.

DOMESTIC RELATIONS—ADOPTION PROCEEDINGS—FOSTER PARENT STANDING—Chester County Children & Youth Services v. Cunningham, 656 A.2d 1346 (Pa. 1995)—The Pennsylvania Supreme Court, in an equally divided opinion, affirmed the decision of the Pennsylvania Superior Court and held that foster parents lack standing to seek adoption of foster children when agency consent has been denied.

The Pennsylvania Supreme Court, in an equally divided opinion, affirmed the decision of the superior court in *Chester County Children & Youth Services v. Cunningham*[432] and held that foster parents lack standing to seek adoption of foster children when agency consent has been denied.[433]

In *Cunningham*, Donald and Middie Cunningham (the "Cunninghams") filed a report of intention to adopt their two foster children.[434] Chester County Children and Youth Services ("CYS") informed the Cunninghams that the request for adoption was denied.[435] The Cunninghams attempted to proceed without the approval of CYS.[436] CYS filed preliminary objections and asserted that the Cunninghams lacked the necessary standing[437] to adopt the foster children.[438] The Cunninghams asserted that CYS had unreasonably withheld the required consent.[439] The trial court overruled the preliminary objections of CYS and certified an immediate appeal to the superior court.[440] The superior court reversed the decision of the trial court and in so reversing, sustained the preliminary objections of CYS.[441]

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432. 656 A.2d 1346 (Pa. 1995).

433. *Cunningham*, 656 A.2d at 1347.

434. *Id.* The two children were five and two years old. *Id.* The Chester County Children and Youth Services ("CYS") had been awarded custody of the children when the natural parents' rights had been terminated. *Id.*

435. *Id.* CYS indicated that the reasons for the denial of the Cunninghams' request for adoption were the advanced ages of the Cunninghams and the fact that the Cunninghams had recently adopted a nine-year-old girl. *Id.* at 1348. Donald Cunningham was 63 years old and Middie Cunningham was 50 years old at the time of the adoption request. *Id.* at 1347.

436. *Id.* at 1348.

437. *Id.* Standing is defined as "a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court; it is the right to take the initial step that frames legal issues for ultimate adjudication by court or jury." BLACK'S LAW DICTIONARY 1405 (6th ed. 1990).

438. *Cunningham*, 656 A.2d at 1348.

439. *Id.*

440. *Id.* The supreme court noted: "The trial court overruled CYS's preliminary objections, certifying that an immediate appeal of the interlocutory order might materially advance the ultimate termination of the matter." *Id.*

441. *Id.* The reports of intention to adopt were dismissed when the preliminary

The Supreme Court of Pennsylvania granted allocatur[442] to review the ability of foster parents to initiate an adoption proceeding without CYS approval.[443] The supreme court's Opinion in Support of Affirmance, authored by Justice Flaherty, began its analysis of the facts of the case by noting the established law of Pennsylvania regarding adoption proceedings.[444] That law was established in *In re Adoption of S.C.P.*,[445] in which the supreme court held that foster parents are not included with those individuals who have standing to adopt and therefore, CYS approval is necessary.[446] The supreme court also noted that the United States Supreme Court has held that foster care is always of a temporary nature and for a fixed period.[447] The court recognized that foster parents play a critical role in the provision of care for foster children.[448] However, the court noted, this role is

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objections of CYS were sustained by the superior court. *Id.*

442. Allocatur is defined as a "word . . . used to denote that a writ or order was allowed." BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

443. *Cunningham*, 656 A.2d at 1348.

444. *Id.* (Flaherty, J., Opinion in Support of Affirmance). *See In re* Adoption of S.C.P., 527 A.2d 1052 (Pa. 1987) (holding that foster parents, under 23 PA. CONS. STAT. § 2531(a) (1991 & Supp. 1995) (delineating who may file a report of intention to adopt), may not file for adoption of their foster children)).

445. 527 A.2d 1052 (Pa. 1987). The supreme court, in *In re Adoption of S.C.P.*, stated: "[F]oster parents have no standing to adopt a child placed in their custody until the absolute, unequivocal, written consent of the children's legal custodian or other person whose consent was necessary was given." *In re Adoption of S.C.P.*, 527 A.2d at 1054.

446. *Id.*

447. *Cunningham*, 656 A.2d at 1350. In defining foster care, the Supreme Court of Pennsylvania cited Smith v. Organization of Foster Families, 431 U.S. 816 (1977), which held that removal procedures whereby foster parents received ten days notice prior to removal of foster children who had been in foster care for greater than eighteen months afforded sufficient due process protection. *Id.* The Supreme Court, in *Smith*, defined foster care as:

> "[A] child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period, and when adoption is neither desirable or possible." Thus, the distinctive features of foster care are first, "that it is care in a family, it is noninstitutional substitute care," and second, "that it is for a planned period—either temporary or extended." This is unlike adoptive placement, which implies a permanent substitution of one home for another.

Smith, 431 U.S. at 823-24.

448. *Cunningham*, 656 A.2d at 1350. The supreme court stated:

> Although foster parents play an important, if not critical, role in the care of dependent children, they are not necessarily qualified to serve as adoptive parents. Thus it is that a child welfare agency may consent to adoption by foster parents in one instance but not in another. Foster parents are merely one example of the many categories of potential adopting parents, people who have established positive relationships and played beneficial roles in the lives of foster children.

Id.

subordinate to the role of CYS as the supervising agency.[449] Because the legislature has deemed it necessary to obtain CYS consent, without the proper consent, the court held, foster parents lack standing to file a report of intention to adopt.[450]

The Opinion in Support of Reversal, authored by Justice Montemuro, argued that under the Adoption Act of 1970 any individual may become an adoptive parent.[451] Justice Montemuro noted that it has often been common practice in Pennsylvania for foster parents to adopt their foster children.[452] Foster parents, Justice Montemuro noted, have a substantial interest in the welfare of their foster children.[453] This substantial interest, Justice Montemuro recognized, should be sufficient to qualify under the "standing" requirement.[454] The Opinion in Support of Reversal also noted that courts retain the ability to dispense with agency consent if it has been withheld unreasonably.[455] Justice Montemuro noted that it is the ultimate duty and responsibility of courts to determine what is in the best interests of the child.[456] The Opinion in Support of Reversal further recognized that the ultimate determination of adoption, in a case such as this, should not rest with CYS.[457]

The Opinion in Support of Reversal recognized that a grant of standing does nothing more than permit a party to be heard in court.[458] The denial of standing, the opinion recognized, did not

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449. *Id.*

450. *Id.* at 1351. *See* 23 PA. CONS. STAT. § 2711(a)(5) (Supp. 1995). Section 2711(a)(5) states:

> (a) General rule.—Except as otherwise provided in this part, consent to an adoption shall be required of the following:
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> . . . .
>
> (5) The guardian of the person of an adoptee under the age of 18 years, if any there be, or of the person or persons having the custody of the adoptee, if any such person can be found, whenever the adoptee has no parent whose consent is required.

Id. Section 2713(2) states: "The court, in its discretion, may dispense with consent other than that of the adoptee to a petition for adoption when: . . . (2) the adoptee is under 18 years of age and has no parent whose consent is required." *Id.* § 2713(2).

451. *Cunningham*, 656 A.2d at 1351 (Montemuro, J., Opinion in Support of Reversal). *See* 23 PA. CONS. STAT. § 2312 (1990). Section 2312 provides that "[a]ny individual may become an adopting parent." *Id.*

452. *Cunningham*, 656 A.2d at 1351.

453. *Id.*

454. *Id.*

455. *Id.* at 1352.

456. *Id. See supra* note 450 for the text of 23 PA. CONS. STAT. § 2713(2) (permitting a court ultimate discretion in waiving the consent requirement).

457. *Cunningham*, 656 A.2d at 1352.

458. *Id.* The Opinion in Support of Reversal stated:

> [F]oster parents who obtain the consent of the agency can file a "Report of

comport with the best interests of the children in this case.[459]

The Opinion in Support of Affirmance failed to recognize the major point of the Opinion in Support of Reversal, namely that a grant of standing for foster parents seeking to adopt without agency consent does nothing more than permit foster parents an avenue for presentation of their argument to the court.[460] This would clearly permit a more fair determination of adoption eligibility, rather than a seemingly arbitrary decision by CYS.

VI. Taxation

A. DECISIONS

TAXATION—REAL ESTATE TAX SALE—NOTICE—UNINCORPORATED ASSOCIATION—Krumbine v. Lebanon County Tax Claim Bureau, 663 A.2d 158 (Pa. 1995)—The Pennsylvania Supreme Court held that the Real Estate Tax Sale Law requires separate notification of a pending real estate tax sale to each trustee of an unincorporated association listed on a deed.

In *Krumbine v. Lebanon County Tax Claim Bureau*,[461] three persons purchased and were deeded property as trustees of an unincorporated association.[462] To satisfy delinquent property taxes, a county tax bureau sold the property and provided notice of the tax sale to only one of the three trustees listed on the property's deed.[463] The trial court upheld the county tax bureau's sale of the property, and the commonwealth court reversed, holding that the notification was per se insufficient.[464]

On appeal to the Supreme Court of Pennsylvania, the court addressed the issue of whether the Real Estate Tax Law requires separate notice to each person listed on the deed as trustee of the property for an unincorporated association.[465]

Intent to Adopt" and gain review of the court to complete the adoption. However, those who fail to obtain the consent of the agency can go no further as they have no "standing." This scheme is contrary to both the letter and spirit of the Act. Our law clearly places the responsibility with the court to make the final determination of what is in the best interests of the child.

Id. at 1353-54.

459. *Id.* at 1354.

460. *Id.*

461. 663 A.2d 158 (Pa. 1995).

462. *Krumbine*, 663 A.2d at 159.

463. *Id.*

464. *Id.*

465. *Id.* (citing PA. STAT. ANN. tit. 72, § 5860.101 (1990)).

The court began its opinion by stating that notice of a pending tax sale must be provided to each owner of the property.[466] Because Pennsylvania's statutes do not recognize an unincorporated association as a legal entity that may own property, the court found that an unincorporated association cannot be the "owner" of property for purposes of notification of a pending tax sale.[467]

The court held that the trustees of an unincorporated association possess legal title to property that is in the unincorporated association's name.[468] When the trustees of an unincorporated association are listed on the property's deed, the court found that such trustees are the "owners" of the property. In conclusion, the court held that the Real Estate Tax Law requires notice of a pending tax sale to each trustee of an unincorporated association listed on the property deed because such trustees are the owners of the property.[469]

Krumbine expands the notice requirements of a pending tax sale of property deeded to an unincorporated association's trustees. By holding that an unincorporated association cannot be an owner of property, the *Krumbine* court mandated separate notification to each trustee as owners of the deeded property.

TAXATION—EARNED INCOME TAX—CONVERTIBLE DEBENTURES—INTEREST AND APPRECIATION—Pugliese v. Township of Upper St. Clair, 660 A.2d 155 (Pa. Commw. Ct. 1995)—The Pennsylvania Commonwealth Court held that an employee's interest and appreciation earned on convertible debentures under an employee incentive plan constitute investment income, not compensation subject to local earned income tax.

The Pennsylvania Commonwealth Court excluded interest and appreciation distributed on corporate convertible debentures from taxation on earned income in *Pugliese v. Township of Upper St. Clair*.[470] In *Pugliese*, an employee participated in a company incentive compensation plan that guaranteed interest on the company's convertible debentures and participation on any appreciation in the company's stock.[471] In 1990, the plan dis-

466. *Id.*
467. *Krumbine*, 663 A.2d at 160-61.
468. *Id.* at 161.
469. *Id.* at 162.
470. 660 A.2d 155 (Pa. Commw. Ct. 1995). A convertible debenture is a "[l]ong term unsecured debt instrument, issued pursuant to an indenture . . . which may be changed or converted into some other security (e.g. stock) usually at the option of the holder." BLACK'S LAW DICTIONARY 401 (6th ed. 1990).
471. *Pugliese*, 660 A.2d at 155.

tributed to the employee a total amount of $760,798.88, of which $317,600 represented a return on the employee's deferred awards and $443,198.88 represented interest and appreciation.[472] The employee reported only the $317,600 on his local tax return; however, the employee's State W-2 Wage and Tax Statement reported the employee's total plan distribution of $760,798.88.[473] In 1991, the plan distributed to the employee a total amount of $99,103.69, of which $76,400 represented a return on the employee's deferred award and $2,273.69 represented interest and appreciation.[474] Again, the employee reported on his local tax return only the portion of the distribution representing the return on his deferred award.[475]

Local taxing authorities notified the employee that he owed additional tax on the interest and appreciation portions of his 1990 and 1991 distributions.[476] The court of common pleas held that the interest and appreciation earned under the employee's incentive plan were not subject to local earned income taxation.[477] The local authorities then appealed to the commonwealth court.[478]

The commonwealth court was thus confronted with the issue of whether interest and appreciation distributed under a corporate incentive plan constitute compensation subject to local taxation.[479] The commonwealth court analyzed the local regulation that defined earned income and determined that the local regulation impermissibly included items within earned income that local municipalities are not authorized to tax.[480] The common-

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472. *Id.*
473. *Id.*
474. *Id.*
475. *Id.* at 156.
476. *Pugliese*, 660 A.2d at 155-56.
477. *Id.* at 156.
478. *Id.*
479. *Id.*
480. *Id.* The local regulation provided that:

> Earned income includes any item that is currently reportable on the Commonwealth of Pennsylvania Department of Revenue Form PA 40 "Gross Compensation" line, any item that is correctly reportable on the "Wages, Salaries, Tips, Etc." line of the IRC Form 1040 or any item that is correctly reportable on the "state wages, tips, etc." box of IRC Form W-2 and that portion of distributed or distributable S Corporation income that represents compensation for services rendered. Examples include but are not limited to: income derived from exercising non-qualified stock options; financial counseling services reimbursement; excess life insurance; spouse's travel reimbursement; moving expense reimbursement; and, mortgage differential.

Id. The court held that local municipalities are only authorized to tax: "Salaries, wages, commissions, bonuses, incentive payments, fees, tips and other compensation received by a person or his personal representative for services rendered, whether

wealth court concluded that interest and appreciation earned under a corporate incentive plan constitute investment income, not compensation subject to local earned income tax.[481] By excluding interest and appreciation on corporate, convertible debentures from local taxation, the commonwealth court eliminated a potentially significant revenue source for local municipalities.

B. LEGISLATION

Sales and Use Tax on Telephone Services

The Pennsylvania General Assembly amended the Sales and Use Tax Statute to include a tax on telephone, telegraph and telecommunications services.[482] The amendment imposes a six percent tax on the gross amount charged to customers for telephone, telegraph and telecommunications services.[483] An entity, subject to a similar tax in another state may apply for a tax credit under the amendment.[484]

Net Loss Carryforward

The Pennsylvania Tax Code was amended to increase the net loss carryforward.[485] For any taxable year, the total allowable net loss deduction may not be greater than one million dollars.[486] However, the net loss deduction in any taxable year may not include net losses from taxable years 1988 through 1994 in excess of five hundred thousand dollars.[487] Prior to the amendment, the total allowable net loss deduction for any taxable year was limited to five hundred thousand dollars.[488]

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directly or through an agent, and whether in cash or in property." *Id.* (citing PA. STAT. ANN. tit. 53, § 6913 (1972)).

481. *Pugliese*, 660 A.2d at 157.

482. 1995 Pa. Laws 21, § 202(c) (to be codified at PA. STAT. ANN. tit. 72, § 7202).

483. *Id.*

484. *Id.*

485. 1995 Pa. Laws 21, § 401-4(c)(1) (to be codified at PA. STAT. ANN. tit. 72, § 7401).

486. *Id.*

487. *Id.*

488. *Id.*

Inheritance Tax Exemption for Spousal Transfers

The Pennsylvania General Assembly amended the Commonwealth's Inheritance Tax Laws to further eliminate inheritance taxes on spousal transfers.[489] The amendment reduces the tax on spousal transfers to three percent for transfers occurring between July 1, 1994 and January 1, 1995.[490] Prior to the amendment, a three percent tax was assessed on spousal transfers occurring between July 1, 1994 and January 1, 1996, with a one percent annual reduction in the tax until January 1, 1988, when the tax would have been completely eliminated.[491]

VII. Employment Law

EMPLOYMENT LAW—VETERANS—HIRING PREFERENCES—Markel v. McIndoe, 59 F.3d 463 (3d Cir. 1995)—The Third Circuit Court of Appeals held that a Pennsylvania statute that requires an employer to give preference to veterans in appointments or promotions to civil service positions, regardless of their standing on the eligibility list, is unconstitutional.

In *Markel v. McIndoe*,[492] the plaintiff, William S. Markel ("Markel"), was denied a promotion to the rank of sergeant in the Penn Hills Police Department (the "Department") despite the fact that he was ranked second on the list of eligible candidates after taking a civil service examination.[493] However, the second, third, and fourth ranked candidates, all of whom were veterans, were subsequently promoted to sergeant.[494]

Markel asserted that he was denied a promotion because, a few years earlier, he had participated in the arrest and prosecution of one of the defendants, Harry R. McIndoe ("McIndoe"), who was the Penn Hills Municipal Manager and who also had authority over the promotions of Penn Hills police officers.[495] Markel filed a lawsuit in which he alleged that the

489. 1995 Pa. Laws 21, § 2116 (to be codified at PA. STAT. ANN. tit. 72, § 9116).

490. *Id.* § 2116(1.1)(i).

491. *See* PA. STAT. ANN. tit. 72, § 9116(a) (Supp. 1995).

492. 59 F.3d 463 (3d Cir. 1995).

493. Markel, 59 F.3d at 464-65.

494. *Id.*

495. *Id.* at 464. Markel had arrested McIndoe five years earlier for driving

denial of promotion was a violation of his constitutional rights because it was in retaliation for his earlier actions.[496] Initially, McIndoe and the Department contended that the promotional decisions were based on objective criteria.[497] However, the ultimate argument that McIndoe and the Department prevailed in the lower court was based on section 7104(b) of the Veteran's Preference Act (the "VPA"), which mandates that veterans be given preference when appointments or promotions are made to public positions based on the results of a civil service exam.[498] The district court concluded that, even though section 7104(b) of the VPA was not a factor which was used by the Department in its promotional decisions, it nonetheless prevented the Department from promoting Markel ahead of any eligible veterans.[499] Based on this conclusion, the district court granted summary judgment for McIndoe and the Department, and Markel appealed.[500]

On appeal, Markel argued that section 7104(b) of the VPA does not require that veterans be promoted over more qualified candidates and, if it does so require, it violates both the Pennsylvania Constitution and the United States Constitution.[501] The court examined Markel's first argument and concluded that, under Pennsylvania case law, the language of the statute is such that its provisions are mandatory and not optional.[502] The court relied on *Rasmussen v. Borough of Aspinwall*,[503] which interpreted the phrase "shall give preference," as it is used in section 7104(b) of the VPA, to mean that an employer must appoint a certified veteran if one appears on the eligibility

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under the influence of alcohol. *Id.* Subsequently, Markel testified against McIndoe in two separate hearings. *Id.*

496. *Id.* at 465. Markel brought the action under section 1983 of Title VII of the Civil Rights Act, 42 U.S.C. § 1983 (1988), and averred that his constitutional rights under the First and Fourteenth Amendments had been violated. *Id.*

497. *Id.*

498. *Markel*, 59 F.3d at 465. Section 7104(b) of the VPA provides:

> [W]henever any [veteran] possesses the requisite qualifications, and his name appears on any eligible or promotional list, certified or furnished as the result of any such civil service examination, the appointing or promoting power in making an appointment or promotion to a public position shall give preference to such [veteran], notwithstanding that his name does not stand highest on the eligible or promotional list.

51 PA. CONS. STAT. § 7104(b) (1990).

499. *Markel*, 59 F.3d at 465.

500. *Id.*

501. *Id.*

502. *Id.* at 466.

503. 519 A.2d 1074 (Pa. Commw. Ct. 1987).

list.[504] The court noted that although *Rasmussen* arose in the context of an appointment rather than a promotion, the pertinent statutory language encompasses both modes of hiring.[505]

Having decided that section 7104(b) of the VPA creates a mandatory promotional preference for veterans, the court addressed Markel's second argument that such a statute is unconstitutional.[506] The court examined the treatment that Pennsylvania courts had given to earlier statutory schemes involving hiring preferences for veterans.[507] The court observed that in *Graham v. Schmid*,[508] the Pennsylvania Supreme Court considered the constitutionality of two statutes designed to aid veterans in obtaining job appointments.[509] In *Graham*, the court held that a provision which required that a fifteen percent bonus be added to the test scores of all veterans was invalid, but a mandatory hiring preference for a veteran listed among the top four successful examinees, without any bonus factored in, was acceptable.[510] The *Graham* court explained that, in order for a veteran hiring preference to be sustained, it must not give priority to those veterans who would not otherwise meet the minimal standards for the position, and it must reasonably reflect the advantages which prior military service can bring to a civil service position.[511]

Although the statutes in *Graham* dealt with appointments to civil service positions, the court noted that *Maurer v. O'Neill*[512] invalidated a similar statute which required a ten point increase in the test scores of veterans who took a promotional exam.[513] The *O'Neill* court drew a distinction between an original appointment and a promotion, and stated that the benefits of previous military service are diminished in a promotional context because the other candidates for promotion will have received the necessary job training and skills for the new position

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504. *Markel*, 59 F.3d at 466 (citing *Rasmussen*, 519 A.2d at 1076).

505. *Id.* The court also noted that a recent common pleas court case held that the language of section 7104(b) of the VPA creates an absolute preference when a veteran is eligible for promotion to a civil service position (citing City of Pittsburgh v. Fraternal Order of Police, No GD94-017598, at 14 (C.P. Allegh. Cty. Nov. 9, 1994)).

506. *Id.* at 467.

507. *Id.*

508. 3 A.2d 701 (Pa. 1938).

509. *Markel*, 59 F.3d at 467. The challenged statutes were part of the Third Class City Law of June 23, 1931, 53 PA. STAT. ANN. tit. 53, §§ 39405, 39407 (1957). *Id.*

510. *Id.*

511. *Id.* at 468 (citing *Graham*, 3 A.2d at 704).

512. 83 A.2d 382 (Pa. 1951).

513. *Markel*, 59 F.3d at 469.

through their civil service work experience, an advantage that did not exist in the context of an original appointment.[514]

With this historical precedent in mind, the court turned its attention to the statute in question.[515] The court observed that section 7104(b) of the VPA is derived from the statutory provisions in *Graham* and *O'Neill* which the Pennsylvania Supreme Court had held unconstitutional.[516] Additionally, the court observed that the rationale and constitutional doctrine expressed in the earlier cases was recently reaffirmed by the Pennsylvania courts.[517] Finally, the court noted that a recent case in the Pennsylvania Court of Common Pleas directly addressed the constitutionality of section 7104(b) of the VPA in a promotional context and concluded that it violates the Pennsylvania Constitution.[518] Therefore, the court held that the absolute preference, with regard to promotions, granted to veterans by section 7104(b) of the Veterans' Preference Act is unconstitutional.[519]

When deciding on promotions for civil service jobs, administrators must now treat veterans and non-veterans alike. However, preference must still be given to veterans when original appointments are made to these positions. The court's separation of these two situations represents a willingness to closely scrutinize hiring preferences to assure that they are narrowly tailored to achieve their goals. Application of the strict standard used in *Markel* to hiring preferences based upon factors other than military service, such as race or gender, could possibly lead to the elimination or limitation of these types of hiring preferences as well.

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514. *Id.* at 470 (citing *O'Neill*, 83 A.2d at 382-84).

515. *Id.*

516. *Id.*

517. *Id.* at 470-73. The court referenced a 1976 opinion by the Pennsylvania Attorney General which relied on *Graham* and *O'Neill* and concluded that two other sections of the VPA were unconstitutional. *Id.* (citing Op. Att'y Gen. No. 76-17 at 54-55 (June 15, 1976)). Also, the court noted that a 1995 decision by the Pennsylvania Supreme Court, which rejected a veteran's preference claim under section 7104(a) of the VPA, relied on the minimal qualifications analysis in *Graham*. *Id.* at 472 (citing Brickhouse v. Spring-Ford Area Sch. Dist., 656 A.2d 483, 486-88 (Pa. 1995)). Thus, the court concluded that it is likely that the appointment versus promotion analysis in *O'Neill* is also still authoritative law. *Id.* at 473.

518. *Markel*, 59 F.3d at 474 n.13 (citing City of Pittsburgh v. Fraternal Order of Police, No. GD94-017598, at 14 (C.P. Allegh. Cty. Nov. 9, 1994)).

519. *Id.* at 474.

EMPLOYMENT LAW—AT-WILL EMPLOYEE—LIMITATIONS ON AN EMPLOYER'S RIGHT TO TERMINATE AN AT-WILL EMPLOYEE—Highhouse v. Avery Transportation, 660 A.2d 1374 (Pa. Super. Ct. 1995)—The Pennsylvania Superior Court held that an employer violates public policy when it terminates an at-will employee who files an unemployment compensation claim during a period when the employee was not working.

In *Highhouse v. Avery Transportation*,[520] the plaintiff, Chester L. Highhouse ("Highhouse"), worked as a bus driver for the defendant Avery Transportation ("Avery").[521] Highhouse was not a salaried employee and the amount of time he worked was dependent upon the seasonal nature of Avery's business.[522] During Avery's slow season in 1990 and early 1991, Highhouse applied for and received unemployment compensation benefits.[523] Highhouse asserted that during the busy period that followed in 1992, the number of assignments that he was given decreased significantly, as did the quality of the assignments.[524] Highhouse claimed that his subsequent discussions with Avery led him to believe that his situation would not improve unless he agreed not to file additional unemployment claims.[525] Despite Avery's alleged threat, Highhouse filed another unemployment compensation claim in 1992.[526] Subsequently, Highhouse averred that Avery informed him that his services would only be used in emergency situations.[527] Highhouse stated that it was for this reason that he declined to take a mandated drug test, at his own expense.[528] Highhouse maintained that the employer's action constituted an actual or constructive discharge, but Avery disputed this and argued that Highhouse quit voluntarily when he refused to take the required test.[529]

In the subsequent wrongful discharge action filed by Highhouse, the trial court entered summary judgment for

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520. 660 A.2d 1374 (Pa. Super. Ct. 1995).

521. *Highhouse*, 660 A.2d at 1375.

522. *Id.* Generally, from May through September Highhouse was regularly employed. *Id.* However, from October through April Avery's business decreased and Highhouse only worked sporadically, if at all. *Id.*

523. *Id.*

524. *Id.*

525. *Id.* at 1376.

526. *Highhouse*, 660 A.2d at 1376.

527. *Id.* Highhouse also stated that he did not receive a Christmas bonus, as did other drivers employed by Avery. *Id.* He claimed that Avery told him that his unemployment check was his bonus. *Id.*

528. *Id.*

529. *Id.*

Avery.[530] However, the Pennsylvania Superior Court reversed the grant of summary judgment and remanded the case to the trial court for further proceedings.[531] Initially, the court noted that there were sufficient facts averred which, if believed, supported Highhouse's claim of a constructive discharge.[532] However, the court indicated that the main issue presented was whether the nature of the constructive discharge, assuming that a constructive discharge had occurred, was such as would support a cause of action by an at-will employee against an employer.[533]

The court first noted that the general rule in Pennsylvania is that no cause of action exists against an employer for the discharge of an at-will employee.[534] However, a few exceptions to this rule have been recognized, but only in very limited circumstances when the discharge violates public policy.[535] The court noted that no appellate court in Pennsylvania has considered whether the discharge of an at-will employee for filing an unemployment compensation claim violates public policy.[536] However, the court observed that in *Monkelis v. Scientific Systems Services*,[537] a federal district court held that an employee stated a cause of action for wrongful discharge when he claimed that his employer invented a reason to discharge him in order to prevent the employee from collecting unemployment compensation.[538] Likewise, the court stated that in *Macken v. Lord Corp.*,[539] the superior court recognized a cause of action when an employee is fired in retaliation for filing a worker's compensation claim.[540] The court concluded that Pennsylvania

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530. *Id.*

531. *Highhouse*, 660 A.2d at 1378.

532. *Id.* at 1376. The court noted that an at-will employee is constructively discharged when the employer creates an intolerable working environment such that the employee is forced to terminate the employment relationship. *Id.*

533. *Id.* The court rejected the employee's contention that he had an oral employment contract and held that he was an at-will employee, with no obligation by either the employee or the employer to continue the employment for any period of time. *Id.*

534. *Id.* at 1376-77 (citing Krajsa v. Keypunch, Inc., 622 A.2d 355, 358 (Pa. Super. Ct. 1993)).

535. *Id.* at 1377 (citing Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989)). The court noted that an employer is liable if a discharge threatens a citizen's social rights, duties, and responsibilities. *Id.* (citing Macken v. Lord Corp., 585 A.2d 1106, 1108 (Pa. Super. Ct. 1991) and Field v. Philadelphia Elec. Co., 565 A.2d 1170, 1179 (Pa. Super. Ct. 1989)).

536. *Highhouse*, 660 A.2d at 1377.

537. 653 F. Supp. 680 (W.D. Pa. 1987).

538. *Highhouse*, 660 A.2d at 1377.

539. 585 A.2d 1106 (Pa. Super. Ct. 1991).

540. *Highhouse*, 660 A.2d at 1377.

courts have long held that an employer violates public policy when it discharges employees for exercising their legal rights.[541] The court further reasoned that an employee's right to receive unemployment compensation is granted by the Commonwealth and is protected as an important expression of public policy by provisions in the law which prevent its waiver or release.[542] Therefore, the court held that the discharge of an employee in retaliation for filing an unemployment compensation claim violates public policy and supports a claim for wrongful discharge.[543]

The court's holding in *Highhouse* creates another public policy exception to Pennsylvania's at-will employment doctrine. However, Pennsylvania courts have generally been reluctant to grant such exceptions and have only recognized a very limited number of situations where the retaliatory termination of an at-will employee violates public policy; these include a discharge for reporting nuclear safety violations and a discharge for serving on jury duty.[544] In *Highhouse*, the court relied on the legislative policy and intent behind the unemployment compensation statute and its relationship to basic human needs to infer that a vital public policy was at stake. Therefore, absent a clear indication from the legislature that the rights granted or protected by a statute reflect an important public policy, it is unlikely that additional exceptions to the at-will employment doctrine will be recognized based upon an employee's assertion of such statutory rights.[545]

EMPLOYMENT LAW—CONTRACTS—ENFORCEMENT OF A DISCRIMINATORY NONCOMPETITION CLAUSE—DeMuth v. Miller, 652 A.2d 891 (Pa. Super. Ct. 1995)—The Pennsylvania Superior Court held that a noncompetition clause, activated by the firing of an employee for cause, is enforceable even though the specified

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541. *Id.*

542. *Id.* at 1377-78 (quoting Warner Co. v. Unemployment Compensation Bd., 153 A.2d 906 (Pa. 1959)). The court also stated that statutory law provides that "[n]o agreement by an employee to waive, release, or commute his rights to [unemployment] compensation . . . shall be valid." *Id.* at 1378 (quoting PA. STAT. ANN. tit. 43, § 861 (1991)).

543. *Id.* at 1378.

544. *See* Greto v. Radix Sys., No. 93-6910, 1994 WL 719646, at *3 (E.D. Pa. Dec. 22, 1994). In *Greto*, the court held that a discharge of an employee in retaliation for filing suit under the Pennsylvania Wage Payment and Collection Act to recover sales commissions did not violate public policy. *Highhouse*, 660 A.2d at 1378.

545. *See Greto*, 1994 WL 719646, at *3; PA. LAW WKLY., Aug. 7, 1995, at 1, 19 (citing and reviewing Shick v. Shirey, PICS Case No. 95-4080 (C.P. Clarion Cty. July 24, 1995)).

cause for the discharge is the employee's sexual orientation.

In *DeMuth v. Miller*,[546] the defendant, Daniel C. Miller ("Miller") was employed by Donald L. DeMuth's ("DeMuth") accounting firm as a professional management consultant.[547] Miller had signed a series of one year employment contracts, each of which contained a noncompetition clause.[548] The clause imposed liability on Miller if, within five years after he was either fired for cause or had voluntarily terminated his employment, he opened a competing firm within a fifty-mile radius of DeMuth's firm and provided such services to any of DeMuth's clients.[549] The noncompetition clause also contained a nonexclusive list of what constituted "cause," which included "homosexuality."[550] After Miller appeared on television representing a gay and lesbian coalition, he was fired by DeMuth pursuant to the noncompetition clause's discharge provisions.[551] Subsequently, Miller opened a competing firm and solicited DeMuth's clients.[552] When Miller failed to compensate DeMuth pursuant to the agreement, DeMuth brought this action to enforce the damages provision of the noncompetition clause of the contract.[553] The trial court found in favor of DeMuth and awarded damages based on the employment contract and Miller appealed.[554]

On appeal, Miller presented several arguments, one of which alleged that judicial enforcement of the noncompetition clause constituted discriminatory state action that interfered with the defendant's right to practice his profession, in violation of both the Pennsylvania and United States constitutions.[555] Judge

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546. 652 A.2d 891 (Pa. Super. Ct.), *allocatur denied*, 665 A.2d 469 (Pa. 1995).

547. *DeMuth*, 652 A.2d at 892.

548. *Id.*

549. *Id.* The damages were set at 125% of the charges for the previous twelve month period for any services rendered to DeMuth's current or former clients. *Id.*

550. *Id.* at 892-93.

551. *Id.* at 893.

552. *DeMuth*, 652 A.2d at 893.

553. *Id.*

554. *Id.*

555. *Id.* at 897-98. Miller also argued that there was no employment contract in force at the time he was discharged, but the court held that although the previous contract had expired several months before the discharge, the conduct of the parties during the interim evidenced an intent to continue their contractual relationship in accordance with the provisions of the expired contract. *Id.* at 893-96. Another argument advanced by Miller, that the terms of the restrictive covenant were unreasonable and amounted to a penalty, was rejected by the court as having been waived by Miller because it had not been raised prior to the appeal or addressed by the trial court. *Id.* at 896.

Popovich, writing for the court, first addressed the question of whether the constitutional issues had been properly preserved for appeal because they were first raised in Miller's post-trial brief and oral argument.[556] The court concluded that because the trial court had exercised its discretion and addressed Miller's constitutional claims in its opinion denying Miller a new trial, the question was adequately preserved for review.[557] In support of his position, Miller relied on *Shelley v. Kraemer*,[558] in which the United States Supreme Court held that judicial enforcement of restrictive covenants based on race amount to a denial of equal protection.[559] However, the court distinguished *Shelley* from the present situation on the basis of property rights.[560] The court noted that while a reasonable expectation of continued employment is a protected property right, Miller's argument was restricted to the implementation of the penalty provision contained in the noncompetition clause, and did not encompass the termination of his employment.[561] Therefore, the court refused to decide the specific question of whether an employee's termination for homosexuality violates public policy or amounts to a denial of equal protection.[562] However, the court stated that discriminatory treatment based on the publication of one's sexual preference is not an actionable claim under Pennsylvania law or under the Equal Protection or Due Process Clauses of the United States Constitution.[563] Therefore, the court held that enforcement of the terms of the noncompetition agreement in this case did not violate public policy and were not contrary to any state or federal constitutional provisions.[564]

In a concurring opinion, Judge Olszewski agreed with the

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556. *Id.* at 896.

557. *DeMuth*, 652 A.2d at 896 (citing Thatcher's Drugs of West Goshen, Inc. v. Consolidated Supermarkets, Inc., 571 A.2d 490, 494 (Pa. Super. Ct. 1990), *rev'd on other grounds*, 636 A.2d 156 (Pa. 1994)).

558. 334 U.S. 1 (1948).

559. *DeMuth*, 652 A.2d at 898 n.3 (citing *Shelley*, 334 U.S. at 20-21). In *Shelley*, homeowners had signed contracts that restricted the sale of their property to Caucasians. *Shelley*, 334 U.S. at 4-5. After some of the homeowners had sold their land to African-Americans, the remaining homeowners sued to enforce the agreements. *Id.* at 5-6.

560. *DeMuth*, 652 A.2d at 898 n.3.

561. *Id.*

562. *Id.* at 898 n.3, 900 n.4.

563. *Id.* at 900.

564. *Id.* Additionally, the court noted that the reason DeMuth sought judicial action was because Miller had opened a business in direct competition with DeMuth's firm, and not because of Miller's sexual preferences. *Id.* Thus, DeMuth sought to penalize Miller for the solicitation of DeMuth's business clients, not for Miller's sexual orientation. *Id.*

majority's decision to permit enforcement of the restrictive covenant, but concluded that judicial involvement did not amount to state action in a constitutional sense.[565] Therefore, the concurrence argued that the majority's discussion of the constitutional issues was unwarranted.[566] Judge Olszewski contended that *Shelley* was distinguishable because it directly involved state action in a discriminatory purpose.[567] And, while he conceded that judicial action that indirectly supports discrimination is also unconstitutional, Judge Olszewski concluded that the court's involvement in the instant matter was too far removed from the alleged discrimination to raise the issue.[568] Therefore, Judge Olszewski opined that the only question that faced the court was the propriety of the noncompetition agreement, which had clearly passed constitutional muster.[569]

In a dissenting opinion, Judge Johnson concluded that judicial enforcement of the penalty provisions of the noncompetition clause, which was triggered by a facially discriminatory provision, violated the United States Constitution.[570] Judge Johnson contended that the present situation was one in which the court's assistance aided another in furthering and profiteering from a discriminatory plan.[571] Judge Johnson argued that, absent judicial intervention, Miller would not owe damages.[572] Thus, it was the state's choice to enforce the covenant and thereby sanction the discriminatory conduct which triggered it, as opposed to the parties' voluntary compliance with its terms.[573] Finally, Judge Johnson asserted that the discriminatory conduct engaged in by the state was without any rational basis, and therefore it was constitutionally deficient.[574] Because the dis-

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565. *DeMuth*, 652 A.2d at 900-01 (Olszewski, J., concurring).

566. *Id.*

567. *Id.* at 901.

568. *Id.* (citing Palmore v. Sidoti, 466 U.S. 429 (1984)). Judge Olszewski noted that the discrimination occurred with regard to Miller's termination but the propriety of the dismissal was not challenged by him. *Id.* at 902. Therefore, it was a "done deal" in which there was absolutely no court involvement. *Id.*

569. *Id.* at 902.

570. *DeMuth*, 652 A.2d at 903 (Johnson, J., dissenting).

571. *Id.* at 904.

572. *Id.* at 905.

573. *Id.* (citing Barrows v. Jackson, 346 U.S. 249, 254 (1953)).

574. *Id.* at 908. Judge Johnson noted that the issue of whether or not homosexuals are a suspect class, for purposes of analysis under the Equal Protection Clause, has not been determined. *Id.* at 905. However, whether discrimination based on sexual orientation is entitled to higher scrutiny was not relevant in this situation, because Judge Johnson concluded that the challenged conduct failed to pass the lowest standard because the disparity of treatment was not rationally related to a legitimate governmental purpose. *Id.*

charge was not based on nondiscriminatory reasons unrelated to Miller's sexual orientation, Judge Johnson stated that the only purpose served by state action would be to give effect to private prejudice, and this was not a legitimate governmental objective.[575]

Although the court's decision clearly indicates that current Pennsylvania law does not grant special protection to homosexuals in an employment context, it leaves unanswered the question of whether a discharge based on sexual orientation is unlawful discrimination. The court's reluctance to address this issue is evident in that both the majority opinion and the concurring opinion endeavor to separate the potential discrimination issue from the employment issue altogether. Thus, the effect of the court's ruling, although it does not represent a departure from the prevailing viewpoint, coupled with a strong dissent, serves to amplify the potential viability of this type of equal protection claim.

VIII. Environmental Law

ENVIRONMENTAL LAW—HAZARDOUS SITE CLEANUP ACT—PRIVATE CAUSE OF ACTION—Smith v. Weaver, 665 A.2d 1215 (Pa. Super. Ct. 1995)—The Pennsylvania Superior Court held that a private cause of action to recover response and cleanup costs for environmental contamination exists under Pennsylvania's Hazardous Site Cleanup Act.

In *Smith v. Weaver*,[576] the plaintiff, Thomas L. Smith ("Smith"), purchased property from the defendant, Pauline Weaver ("Weaver").[577] The property had formerly been operated as a gasoline station.[578] Weaver agreed to sell all of the equipment located on the property and the sales agreement specifically listed three underground steel storage tanks.[579] Ten years after the purchase, Smith removed the underground storage tanks and discovered that there were two other tanks located on the property.[580] Both of the tanks had leaked contami-

575. *DeMuth*, 652 A.2d at 907-08.
576. 665 A.2d 1215 (Pa. Super. Ct. 1995).
577. *Weaver*, 665 A.2d at 1216.
578. *Id.*
579. *Id.*
580. *Id.*

nants and pollutants into the surrounding soil.[581] Smith notified the Pennsylvania Department of Environmental Resources (the "DER"), which required him to remove the tanks and the contaminated soil.[582] Smith then sued Weaver under Pennsylvania's Hazardous Site Cleanup Act (the "HSCA")[583] to recover the costs associated with the cleanup activity.[584] The trial court held, inter alia, that no private cause of action exists under the HSCA to recover the costs associated with the cleanup of contaminated property.[585]

On appeal, the court noted that no Pennsylvania appellate court had ruled on the specific issue of the existence of a private cause of action under the HSCA.[586] However, the superior court noted that a United States district court had considered the question in *Toole v. Gould, Inc.*[587] and concluded that a private cause of action is appropriate under the HSCA to carry out its goals.[588] Using the analysis in *Toole* as a guide, the court noted that the language of the enforcement provisions in section 6020.1101 of the HSCA place no specific limitations on who can sue for response and cleanup costs.[589] Furthermore, the court noted that the liability provisions in section 702 of the HSCA provide that one who commits a violation of the HSCA is liable to the state for any remedial cleanup costs and to any other person who incurred necessary response costs.[590] The court

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581. *Id.*

582. *Weaver*, 665 A.2d at 1217.

583. PA. STAT. ANN. tit 35, §§ 6020.101-.1305 (1993 & Supp. 1995).

584. *Weaver*, 665 A.2d at 1217. Smith alleged that Weaver knew or should have known about the existence of the leaking underground tanks at the time of the sale and her failure to disclose that information constituted a negligent misrepresentation about the condition of the property. *Id.*

585. *Id.* at 1220. The trial court also dismissed several other counts of Smith's complaint that were premised on the assumption that Weaver was still the legal owner of the leaking tanks. *Id.* at 1217-19. The trial court held that the sales agreement conveyed all of the tanks to Smith, even those that were not specifically listed. *Id.* at 1217. However, the superior court concluded that the sales agreement was ambiguous and disputed issues of fact existed as to the ownership of the leaking tanks. *Id.* Therefore, the court reversed the dismissal of those allegations based on Weaver's ownership of the leaking tanks. *Id.* at 1217-19.

586. *Id.* at 1220.

587. 764 F. Supp. 985 (M.D. Pa. 1991).

588. *Weaver*, 665 A.2d at 1220 (citing *Toole*, 764 F. Supp. at 993).

589. *Id.* The statute provides in pertinent part: "[A] release of a hazardous substance . . . shall constitute a public nuisance. Any person allowing such a release . . . shall be liable for the response costs caused by the release." PA. STAT ANN. tit. 35, § 6020.1101.

590. *Weaver*, 665 A.2d at 1220-21. The statute provides:

> [A] person who is responsible for a release . . . of a hazardous substance from a site . . . is strictly liable for the following response costs and damages. . . . Reasonable and necessary or appropriate costs of remedial response incurred

then adopted the analysis used by the *Toole* court, which reasoned that these provisions only have meaning if they are construed to establish a right of recovery for a person other than the government.[591] Thus, the court held that a private cause of action exists under the HSCA.[592]

The court also addressed several other issues of statutory construction presented by the existence of a private cause of action. The court noted that section 1301(a) of the HSCA, which delays enforcement of any recovery provisions until the DER has instituted an administrative or judicial enforcement action, do not apply in a private cause of action.[593] Additionally, sections 6020.505 and 6020.506 of the HSCA, which require the development of an administrative record and the selection of a remedial response plan based on that record, are also inapplicable in a private cause of action.[594] The court held that none of these directives were required to be carried out in a private cause of action because to do so would undermine the purpose of the HSCA, which is to promote prompt and efficient cleanup of contaminated sites.[595]

The court's decision in *Weaver* allows individuals to bring a suit under the HSCA to recover costs associated with environmental cleanup without significant involvement by the DER. By not requiring state involvement in the action, the court demonstrated a preference for private industry to respond to environmental concerns. Although there is always a danger of frivolous litigation motivated by monetary interests in allowing individuals to bring a cause of action previously limited to the state, these concerns are greatly outweighed by the potential advantages of private actions. By limiting the involvement of the DER, and its attendant bureaucratic and regulatory burdens, individuals will be able to repair environmental damage quicker and more efficiently without any risk of loss or lengthy delays in recovery. This in turn may force polluters to think twice about the potential costs associated with their actions, thus resulting

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by the United States, the Commonwealth, or a political subdivision. Other reasonable and necessary or appropriate costs of response incurred by any other person.

35 PA. CONS. STAT. § 6020.702.

591. *Weaver*, 665 A.2d at 1221 (citing *Toole*, 764 F. Supp. at 993).

592. *Id.*

593. *Id.* Section 1301(a) of the HSCA provides: "[A]n owner shall not be subject to enforcement orders or recovery provisions of this Act until the [DER] has instituted an administrative or judicial enforcement action . . . and the owner . . . has failed to comply." PA. STAT ANN. tit. 35, § 6020.1301(a).

594. *Weaver*, 665 A.2d at 1222 (citing PA. STAT ANN. tit. 35, §§ 6020.505-.506).

595. *Id.* at 1221-22.

in greater environmental protection.

IX. Estates and Trusts

ESTATES AND TRUSTS—SPENDTHRIFT TRUSTS—ABILITY OF CREDITORS TO REACH TRUST INCOME—Schreiber v. Kellogg, 50 F.3d 264 (3d Cir. 1995)—The Third Circuit Court of Appeals held that the Pennsylvania Supreme Court would adopt section 157(c) of the Restatement (Second) of Trusts, which allows creditors to reach spendthrift trust interests in satisfaction of claims for services or materials that have preserved or benefitted the beneficiary's interest in the trust.

In *Schreiber v. Kellogg*,[596] attorney Palmer K. Schreiber ("Schreiber") was retained by Christopher G. Kellogg ("Kellogg") to increase the purchase price in a stock sale.[597] Kellogg was a contingent income beneficiary of a trust, the principal of which was composed of the stock.[598] The trustees had been offered forty million dollars for the stock and, partially as a result of Schreiber's efforts, the ultimate purchase price was sixty million dollars.[599] After the stock was sold, Schreiber filed an action on behalf of Kellogg against the trustees, alleging negligence and breach of fiduciary duty.[600] The suit was settled and Kellogg agreed to pay Schreiber eighty thousand dollars for his work.[601] Kellogg failed to pay the amount due and Schreiber sued for breach of contract and obtained a judgment against Kellogg.[602] To satisfy the judgment, Schreiber sought to execute on Kellogg's interest in the trust.[603]

The district court denied Schreiber's motion and held that the testator had intended to provide a spendthrift provision[604] in

596. 50 F.3d 264 (3d Cir. 1995).

597. *Schreiber*, 50 F.3d at 266.

598. *Id.* at 265.

599. *Id.* at 266. Schreiber was awarded $117,000 in counsel fees for his efforts in the stock sale by the Montgomery County Orphans' Court. *Id.*

600. *Id.*

601. *Id.*

602. *Schreiber*, 50 F.3d at 266.

603. *Id.*

604. *Id.* at 267. The court defined a "spendthrift trust" as one in which the interest of the beneficiary cannot be assigned by the beneficiary or reached by the beneficiary's creditors. *Id.* (citing AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 151, at 83 (4th ed. 1987)).

the trust to protect Kellogg's interest.[605] Furthermore, the district court rejected Schreiber's claim, which was based on section 157(c) of the Restatement (Second) of Trusts (the "Restatement"), that he was entitled to reach the trust proceeds, regardless of the spendthrift nature of the trust, because the claim arose out of services rendered to benefit the interest of the beneficiary.[606] The district court held that Pennsylvania courts would not apply section 157(c) of the Restatement under the circumstances of this case.[607] On appeal, the court of appeals conducted a de novo review of the district court's determination of Pennsylvania law and concluded that Pennsylvania courts would apply section 157(c) of the Restatement.[608]

Initially, the court addressed the issues of the applicable standard of review and the district court's determination of the spendthrift nature of the trust.[609] The court determined that, under Pennsylvania law, interpretation of a will is generally a question of law when a court relies solely on the language of the will and does not consider extrinsic evidence, as was the case here.[610] Thus, review of the trial court's decision was subject to a de novo standard, rather than a clearly erroneous standard.[611] The court then determined that the testator had intended to protect the bequests made to his great-grandchildren, of whom Kellogg was one, with a spendthrift provision contained elsewhere in the will.[612] Having decided that the trust in question was a spendthrift trust, and therefore protected from the reach of creditors, the court turned its attention to the issue of whether a Pennsylvania court would accept section 157(c) of the Restatement as an exception to the general rule

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605. Schreiber v. Kellogg, 849 F. Supp. 382, 389 (E.D. Pa. 1994), *rev'd*, 50 F.3d 264 (3d Cir. 1995).

606. *Schreiber*, 849 F. Supp. at 394. Section 157(c) provides: "[A]lthough a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary . . . for services rendered and materials furnished which preserve or benefit the interest of the beneficiary." RESTATEMENT (SECOND) OF TRUSTS § 157 (1974).

607. *Schreiber*, 849 F. Supp. at 394.

608. *Schreiber*, 50 F.3d at 267, 275.

609. *Id.* at 266-67.

610. *Id.*

611. *Id.* at 266 n.3, 267.

612. *Id.* at 269. The dispute centered around whether a spendthrift provision in the third paragraph of the will extended to the bequest made to the testator's great-grandchildren in the eighth paragraph of the will. *Id.* at 268. The court found that the language in the eighth paragraph, which stated that it was "subject to the provisions herein previously contained," subjected all bequests therein to the spendthrift provisions of the earlier paragraph. *Id.* at 269.

against the alienation of spendthrift trusts.[613]

The court noted that although no Pennsylvania court has considered the application of section 157(c), much of the general common law regarding spendthrift trusts has derived from Pennsylvania case law.[614] With this in mind, the court noted that Pennsylvania has either adopted or approved of all of the other exceptions contained in section 157 of the Restatement.[615] The exception in section 157(a), relating to support claims, has long been allowed by Pennsylvania courts and is effectively embodied in a Pennsylvania statute.[616] The exception for claims for necessary services rendered to the beneficiary, contained in section 157(b), was recently cited with approval by the Pennsylvania Supreme Court.[617] The court noted that the exception for claims by the United States has been applied to recover unpaid taxes from the beneficiary.[618] Moreover, the court stated that it was unable to find any Pennsylvania case that declined to follow, or even criticize, section 157 of the Restatement.[619] Finally, the court held that all of the exceptions contained within section 157 override the normal operation of a spendthrift trust and are therefore applied without any consideration of a testator's intent.[620]

The court asserted that the fundamental purposes of section 157(c) are to prevent the unjust enrichment of a beneficiary and to ensure that beneficiaries can obtain the means by which to protect their interests.[621] The court concluded that the applica-

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613. *Schreiber*, 50 F.3d at 271.

614. *Id.* at 272.

615. *Id.* at 273-75. In addition to § 157(c), the remaining portions of § 157 provide:

> Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary, (a) by the wife or child of the beneficiary for support, or by the wife for alimony; (b) for necessary services rendered to the beneficiary or necessary supplies furnished to him; . . . (d) by the United States or State to satisfy a claim against a beneficiary.

RESTATEMENT (SECOND) OF TRUSTS § 157.

616. *Schreiber*, 50 F.3d at 273. The court cited *In re* Stewart's Estate, 5 A.2d 910 (Pa. 1939) and 20 PA. CONS. STAT. § 6112 (1992), which provides that "[i]ncome of a trust subject to spendthrift or similar provisions shall nevertheless be liable for the support of anyone whom the income beneficiary shall be under a legal duty to support." 20 PA. CONS. STAT. § 6112.

617. *Schreiber*, 50 F.3d at 274 (citing Lang v. Commonwealth, Dep't of Pub. Welfare, 528 A.2d 1335 (Pa. 1987)).

618. *Id.* (citing Quigley Estate, 22 Pa. D. & C.2d 598 (Mont. Cty. Orphans' Ct. 1960)).

619. *Id.* at 275.

620. *Id.* at 276.

621. *Id.* at 271.

tion of section 157(c) in a situation where an attorney is seeking to be paid for services rendered in connection with a trust is consistent with these interests.[622] The court noted that the only other state that has examined the application of section 157(c) did so in a similar situation and reached the same conclusion.[623] In *Evans & Luptak v. Obolensky*,[624] the Michigan Court of Appeals applied section 157(c) and reversed a lower court decision which had denied execution on the assets of a spendthrift trust by a law firm that had been hired by the beneficiary to obtain the best price for the sale of the primary trust assets, but had not been paid for its services.[625] Therefore, the court held that section 157(c) of the Restatement applies in Pennsylvania and was applicable to the present situation.[626]

However, the court limited the application of section 157(c) to those situations where there is an actual preservation of, or benefit to, the interests of the beneficiary, as opposed to only a good faith attempt to preserve or benefit the interests of the beneficiary, without tangible results.[627] The court concluded that this restriction furthers the purposes of the Restatement but limits the invasion of a spendthrift trust to extraordinary situations.[628] Thus, the court remanded the case to the district court for a determination of whether Schreiber's services provided a tangible benefit to Kellogg's interests in the trust.[629]

By recognizing another exception by which the assets of a spendthrift trust may be reached, the court has given creditors an additional tool by which they can obtain payment for their services. However, because of the nature of this particular exception to the inviolability of a spendthrift trust, the likely beneficiaries of the court's decision will be lawyers and financial planners. Fortunately, by requiring such a creditor to demonstrate that it has provided an actual benefit to the trust interests, rather than simply a good faith effort, the court has effectively safeguarded the interests of the trust beneficiary from potential opportunists. Because this is in keeping with the general pur-

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622. *Schreiber*, 50 F.3d at 275.

623. *Id.* at 272-73.

624. 487 N.W.2d 521 (Mich. Ct. App.), *appeal denied*, 496 N.W.2d 289 (Mich. 1992).

625. *Schreiber*, 50 F.3d at 273, 275.

626. *Id.* at 275-76.

627. *Id.* at 277.

628. *Id.* at 277-78. The court relied on the comments in section 157 of the Restatement and on Pennsylvania case law which indicates that assets of spendthrift trusts should only be intruded upon in exceptional situations. *Id.*

629. *Id.* at 278.

poses of all of the Restatement's exceptions to the inalienability of a spendthrift trust, it is likely that the circuit court's holding will be adopted by Pennsylvania courts.

ESTATES AND TRUSTS—DISTRIBUTION—ABILITY OF A COURT TO REDISTRIBUTE A DECEDENT'S ESTATE—*In re* Donald T. Jones, 660 A.2d 76 (Pa. Super. Ct. 1995)—The Pennsylvania Superior Court held that a trial court has the authority to compel the original distributees of an estate to relinquish a portion of their inheritance to newly discovered heirs of the decedent, despite the absence of fraud in the administration of the estate.

In *In re Donald T. Jones*,[630] the administrator of a decedent's estate distributed the proceeds of the estate to five original distributees, maternal cousins of the decedent, following the issuance of a Decree of Distribution and Adjudication.[631] Shortly thereafter, the administrator received notice from the assignee of three paternal cousins of the decedent that there were additional heirs to the estate.[632] The administrator immediately notified the five original distributees of the possibility of additional heirs and advised the distributees to retain their distributive shares in full until the matter was resolved.[633] The administrator later suggested that the five original heirs deposit half of their inheritance in an interest bearing account until the dispute was settled, but the original distributees refused and instead retained counsel.[634]

More than one year after the administrator had been notified of the possible existence of the additional heirs, the assignee for the additional heirs filed a Petition for Review and Rehearing pursuant to section 3521 of the Probate, Estates and Fiduciaries Code (the "Probate Code").[635] After a hearing before a master,

630. 660 A.2d 76 (Pa. Super. Ct. 1995).

631. *Jones*, 660 A.2d at 78. The decedent died on November 26, 1989 and advertisement of the estate for probate began on December 5, 1989. *Id.* A first and final account was filed on February 23, 1990. *Id.* The Decree of Distribution was issued on May 7, 1990, and actual distribution was made by the administrator on May 29, 1990. *Id.*

632. *Id.* The three paternal cousins were not aware of their status until they were contacted on May 22, 1990 by the assignee, a company that specialized in locating missing heirs. *Id.* at 78 n.4. However, the cousins did not learn whose estate they were heirs to until June 11, 1990, after the assignment agreements had been finalized. *Id.*

633. *Id.* at 78-79.

634. *Id.* at 79.

635. *Id.* Section 3521 of the Probate Code provides:

> [I]f any party in interest shall, within five years after the final confirmation of any account of a personal representative, file a petition to review any part of the account or of an auditor's report, or of the adjudication, or of any decree

the trial court accepted the master's recommendation that the estate be redistributed according to the petition.[636] The original distributees appealed.[637]

During its review of the decision, the Pennsylvania Superior Court noted that it was unaware of any similar case decided under the current statute.[638] However, the court stated that review of a confirmed distribution has normally been granted only when the face of the record indicates errors of law, or new matter has arisen since the distribution, or equity requires a review and no person will suffer because of it.[639] The court held that the present situation fell into the second category and the trial court properly allowed a review.[640] The court then turned its attention to the original distributees' argument that a court could only order the return and redistribution of a decedent's estate after an actual distribution had been made if fraud was present in the original distribution.[641]

The court noted that the original distributees' based their argument on cases decided under earlier statutes which were mere predecessors to the current version.[642] The court noted that the relevant statutes enacted in 1840, 1917, and 1949 expressly precluded the court from granting a review or redistribution with regard to property that had already been distributed to an heir.[643] However, the present statute, codified at section 3521 of the Probate Code, does not expressly bar review after distribution has been made.[644] The court also noted that the

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of distribution, setting forth specifically alleged errors therein, the court shall give such relief as equity and justice shall require.

20 PA. CONS. STAT. § 3521 (1992).

636. *Jones*, 660 A.2d at 79. The petition requested that the estate be redistributed so that both the original distributees and the newly discovered heirs each received a 1/8 share. *Id.*

637. *Id.*

638. *Id.* at 81.

639. *Id.* at 80 (citing Estate of Roart, 568 A.2d 182, 185 (Pa. Super. Ct. 1989)).

640. *Id.*

641. *Jones*, 660 A.2d at 80. There were no allegations of fraud contained in the Petition for Review. *Id.* at 80 n.6.

642. *Id.* at 80. The distributees relied on Estate of Mack, 169 A. 468 (Pa. Super. Ct. 1933), Downing v. Felheim, 164 A. 598 (Pa. 1932) and Ferguson v. Yard, 30 A. 517 (Pa. 1894). Each of these cases held that the redistribution of an estate is prevented if an actual distribution had already been made and no fraud was present. *Id.*

643. *Id.* Section 721 of the Fiduciary's Act of 1949 provided that a court could give "such relief as equity and justice shall require" but the court was precluded from permitting a review "as to any property distributed by the personal representative in accordance with a decree of court before the filing of the petition." PA. STAT. ANN. tit 20, § 320.721 (1949) (amended 1970) (current version at 20 PA. CONS. STAT. § 3521 (1992)).

644. *Jones*, 660 A.2d at 80. *See supra* note 635 for the text of section 3521 of

Uniform Probate Code, although not adopted in Pennsylvania, also appears to authorize the return and redistribution of inheritance after an actual distribution has been made.[645] Thus the court concluded that the previous requirements of fraud or predistribution claims against the estate which were necessary to obtain review of an estate distribution have been abolished.[646] The court noted that the only remaining limitations are the five year time limit and the court's determination of equity and justice, as provided by section 3521 of the Probate Code.[647]

The court's decision in *Jones* clearly lays to rest any lingering doubts about the ability of lost heirs to reclaim inheritances from distributees of a decedent's estate. The official elimination of fraud as a prerequisite to redistribution should be a boon to companies that locate missing heirs in exchange for a percentage of the inheritance. However, at the same time, it will create uncertainty among distributees of estates of all sizes as to the security of their inheritances for up to five years after distribution. The statutorily mandated requirements of equity and justice apparently only assure that an estate is redistributed to legitimate lost heirs. The court did not indicate that these requirements are also operative with regard to the disposition of the inheritance by the original distributees. Thus, given the court's reliance on the Uniform Probate Code, which holds an original distributee liable for the value of the property as of the date of distribution, the distributee of a decedent's estate could face significant liability long after the resources to meet that debt have been exhausted.

ESTATES AND TRUSTS—JOINT TENANTS—ABILITY OF AN EXECUTOR TO DISCLAIM A DECEDENT'S SURVIVORSHIP INTEREST—*In re* Estate of Bernecker, 654 A.2d 246 (Pa. Commw. Ct. 1995)—The Pennsylvania Commonwealth Court held that an executor may terminate a decedent's survivorship interest in a joint tenancy by timely filing a disclaimer, and thereby avoid the double imposition of state inheritance tax.

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the Probate Code.

645. *Jones*, 660 A.2d at 81 n.7. Section 3-909 of the Uniform Probate Code provides that a distributee of property improperly distributed is liable to return the property and its income, or its value as of the date of distribution if the property has been disposed of. *Id.* (citing UNIFORM PROBATE CODE § 3-909 (1983 and Supp. 1994)).

646. *Id.* at 81.

647. *Id.*

In *In re Estate of Bernecker*,[648] Laura N. Bernecker (the "decedent's sister") died six months before Eugenia Bernecker (the "decedent") and left her entire estate to the decedent.[649] At the time of her death, the decedent's sister held stocks and bank accounts with the decedent as a joint tenant with the right of survivorship.[650] Both the decedent's sister and the decedent named each other as their beneficiaries and appointed Harry F. Price (the "executor") as their executor and alternative beneficiary.[651] Upon the decedent's death, and after all known debts of both estates were paid, the executor filed a Petition to File a Disclaimer on behalf of the decedent, based on section 6202 of the Probates, Estates, and Fiduciaries Code (the "Probate Code").[652] The purpose of the disclaimer was to avoid paying the state inheritance tax twice, due to the duplicate administration of the two estates.[653]

The orphans' court granted the executor's petition to disclaim the decedent's interest in all of the property passing to her through her sister's will, as well as the decedent's survivorship interest in all of the jointly owned assets.[654] The Commonwealth of Pennsylvania, Department of Revenue (the "Department") appealed the ruling and asserted that a disclaimer of jointly held assets is not allowed.[655] The Department based its argument on section 9116(c) of the Inheritance and Estate Tax Act (the "Tax Act").[656] The Department contended that the Tax

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648. 654 A.2d 246 (Pa. Commw. Ct. 1995).

649. *Bernecker*, 654 A.2d at 247.

650. *Id.*

651. *Id.*

652. *Id.* Section 6202 of the Probate Code provides generally that a disclaimer of an interest in property may be filed on behalf of a decedent by the decedent's personal representative, but the disclaimer is not effective until authorized by a court after it has determined that the disclaimer will not materially prejudice the rights of creditors, heirs, or beneficiaries of the decedent. 20 PA. CONS. STAT. § 6202 (1992).

653. *Bernecker*, 654 A.2d at 247.

654. *Id.*

655. *Id.*

656. *Id.* at 248. The section of the Tax Act on which the Department relied provides in pertinent part:

> When any person entitled to a distributive share of an estate, whether under an inter vivos trust, a will or the intestate law, renounces his right to receive the distributive share receiving therefor no consideration, or exercises his elective rights . . . receiving therefor no consideration other than the interest in assets passing to him as the electing spouse, the tax shall be computed as though the persons who benefit by such renunciation or election were originally designed to be the distributees, conditioned upon an adjudication or decree of distribution expressly confirming distribution to such distributees.

PA. STAT. ANN. tit. 72, § 9116(c) (Supp. 1995).

Act only allows someone who is entitled to a distributive share of an estate to disclaim an interest received from a decedent.[657] But, the Department argued, because the interest that the decedent obtained from her sister's estate was a survivorship interest, it was acquired by operation of law and was not a distributive share, and therefore it fell outside the scope of the statute.[658]

The executor contended that section 6201 of the Probate Code allowed the decedent to disclaim any interest in property, including a survivorship interest.[659] The executor asserted that such a disclaimer converted the joint tenancy interest into a tenancy in common interest.[660] The executor also argued, under section 9116(c) of the Tax Act, that such an interest may be disclaimed for inheritance tax purposes if it is filed within nine months of the death of the first tenant.[661] Furthermore, the executor stated that he had met the requirements of section 6202 of the Probate Code, relating to disclaimers filed by persons other than the beneficiary.[662] Therefore, the executor asserted, the orphans' court properly allowed the disclaimer.[663]

The commonwealth court stated that the issue of whether a disclaimer of a survivorship interest in jointly held personalty is valid for inheritance tax purposes was a case of first impression for the court.[664] The court first noted that the list of disclaimable property interests in section 6201 of the Probate Code is not exclusive and could include other types of interests.[665] However, the court was ultimately persuaded by the reasoning of the orphans' court, which noted that a joint tenant

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657. *Bernecker*, 654 A.2d at 248.

658. *Id.*

659. *Id.* Section 6201 of the Probate Code provides:

> [A] person to whom an interest in property would have devolved by whatever means, including a beneficiary under a will, an appointee under the exercise of a power of appointment, a person entitled to take by intestacy, a donee of an inter vivos transfer, a donee under a third-party beneficiary contract (including beneficiaries of life insurance and annuity policies and pension, profit-sharing and other employee benefit plans), and a person entitled to a disclaimed interest, may disclaim it in whole or part by a written disclaimer.

20 PA. CONS. STAT. § 6201 (1992).

660. *Bernecker*, 654 A.2d at 248.

661. *Id.*

662. *Id.* The executor asserted that no material prejudice would result to any creditors, heirs, or beneficiaries if the disclaimer were allowed, because all known debts of both estates had been paid and he was the only beneficiary. *Id.* See *supra* note 652 for the text of section 6202 of the Probate Code.

663. *Bernecker*, 654 A.2d at 248.

664. *Id.*

665. *Id.* See *supra* note 659 for the text of section 6201 of the Probate Code.

with a right of survivorship has the unilateral right to sever the joint tenancy.[666] The court concluded that a logical extension of this right allows a surviving joint tenant, or the survivor's personal representative, to terminate a survivorship interest by filing a disclaimer.[667]

The court also noted that three federal courts of appeal cases, which had analyzed the identical issue of a disclaimer of a survivorship interest in order to avoid state and federal inheritance taxes, also concluded that such a disclaimer is effective under both federal and state law.[668] Therefore, the court held that the survivorship interest of a deceased joint tenant qualifies as a distributive share of the estate of an earlier deceased joint tenant, and may be disclaimed for inheritance tax purposes under section 9116(c) of the Tax Act.[669]

The court's ruling in *Bernecker* follows directly from the right of one joint tenant to sever the joint tenancy without seeking permission from the other joint tenants. The court's decision recognizes that removing that right immediately upon the death of one of the joint tenants, which may occur with little or no notice, would abruptly eliminate one of a joint tenant's basic rights. However, with the decision in *Bernecker*, a surviving joint tenant now has greater flexibility to favorably dispose of the jointly held property and avoid potential tax liability.

X. Property Law

PROPERTY LAW—EASEMENTS—DE FACTO TAKING—SUBSEQUENT AGREEMENT, USE AND ACQUIESCENCE—REASONABLE AND NECESSARY USE—Zettlemoyer v. Transcontinental Gas Pipeline Corp., 657 A.2d 920 (Pa. 1995)—The Pennsylvania Supreme Court held that in an ambiguous easement, width is to be determined by a necessary and reasonable use standard that effectuates the purpose of the original grant as to the original parties.

In *Zettlemoyer v. Transcontinental Gas Pipeline Corp.*,[670] the Supreme Court of Pennsylvania held that in an ambiguous ease-

666. *Bernecker*, 654 A.2d at 248 (citations omitted).

667. *Id.*

668. *Id.* at 249 (citing Estate of Dancy v. Commissioner, 872 F.2d 84 (4th Cir. 1989), McDonald v. Commissioner, 853 F.2d 1494 (8th Cir. 1988) and Kennedy v. Commissioner, 804 F.2d 1332 (7th Cir. 1986)).

669. *Id.*

670. 657 A.2d 920 (Pa. 1995).

ment, width is to be determined by a necessary and reasonable use standard that effectuates the purpose of the original grant as to the original parties.[671]

In *Zettlemoyer*, Transcontinental Gas Pipeline Corp. ("Transco") purchased a pipeline right-of-way across property owned by Serfas Lumber Co. ("Serfas").[672] Under the agreement between Transco and Serfas, Transco cleared a 100 foot-wide right-of-way in 1958.[673] Transco constructed pipelines in 1958, 1971 and 1991.[674] Transco, in constructing the third pipeline, found it necessary to clear an additional thirty feet of woods so that construction equipment could safely maneuver around the other two pipelines.[675]

The Zettlemoyers obtained portions of the land from Serfas by deed beginning in 1958.[676] However, the Zettlemoyers took title to the property subject to the right-of-way held by Transco.[677]

In 1991, the Zettlemoyers filed a petition for an appointment of viewers[678] in the court of common pleas claiming that Transco's act of clearing the additional thirty feet of woods constituted a de facto condemnation[679] and therefore, the Zettlemoyers were entitled to additional compensation.[680] The court of common pleas dismissed the Zettlemoyers' action and

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671. *Zettlemoyer*, 657 A.2d at 922.

672. *Id.* Transco constructs natural gas lines and transports natural gas. *Id.*

673. *Id.* The agreement stated in pertinent part:

> [Transco] shall have all other rights and benefits necessary for the full enjoyment or use of the rights herein granted, including, but without limiting the same to, the free and full right of ingress, egress and regress over and across said lands and other lands of the grantor to and from said right from time to time to cut and remove all trees, undergrowth and other obstructions that may injure, endanger or interfere with the construction, operation, maintenance and repair of said pipelines . . . .

Id.

674. *Id.* In August of 1958, the first pipeline was constructed. *Id.* In August of 1971, the second pipeline was constructed twenty-five feet from the original pipeline. *Id.* Transco cleared an additional thirty feet of woods, beyond the original 100 feet, in order to construct the third pipeline in 1991. *Id.*

675. *Id.*

676. *Zettlemoyer*, 657 A.2d at 922.

677. *Id.*

678. *Id.* A board of viewers is comprised of "[p]ersons appointed by a court to make an investigation of certain matters . . . and to report to the court the result of their inspection, with their opinion on the same." BLACK'S LAW DICTIONARY 1568 (6th ed. 1990).

679. *Zettlemoyer*, 657 A.2d at 923. A de facto condemnation occurs when "the entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property." *Id.* (citing Griggs v. Allegheny County, 168 A.2d 123, 124 (1961) (holding that the County would not be liable for appropriation of adjacent land to airport from take-off and landing activities over the land), *rev'd on other grounds*, 369 U.S. 84 (1962)).

680. *Id.*

held that the additional thirty feet was necessary for the stated purpose of Transco.[681] The commonwealth court reversed the trial court and held that Transco had established the easement at 100 feet for over thirty years and Transco could not arbitrarily change that distance without compensating the Zettlemoyers.[682]

The Supreme Court of Pennsylvania granted allocatur[683] to clarify the standard for ambiguous easements.[684] The supreme court noted the language of the agreement that unambiguously granted Transco the right to construct the third pipeline.[685] However, the supreme court noted, the agreement was ambiguous as to the exact width of the easement.[686] The supreme court noted prior case law that addressed the issue of ambiguous widths in easements.[687] The court concluded that prior case law has established that when an easement is ambiguous as to width, it must be determined whether the asserted use is reasonable and necessary as compared to the original purpose of the easement.[688]

The court stated that the clearing of the additional thirty feet of woods by Transco was within the intended purpose of the easement between the original parties.[689] The court commented that the Zettlemoyers based their argument on the theory that Transco was limited to the 100 foot wide right-of-way because of Transco's subsequent agreement, use and acquiescence.[690] The court, in response to the argument advanced by the Zettlemoyers, stated that as a matter of law subsequent

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681. *See Zettlemoyer*, No. 2772 Civil 1991, slip op. at 6 (C.P. Monroe Cty. Feb. 20, 1992) (holding that the act of clearing the additional tract of land was necessary for the use and enjoyment of the right of way).

682. Zettlemoyer v. Transcontinental Gas Pipeline Corp., 617 A.2d 51 (Pa. Commw. Ct. 1992) (holding that the maintenance of an easement at 100 feet for thirty three years establishes the use and extent of the agreement; and therefore, expansion of the easement would necessitate further compensation), *rev'd*, 657 A.2d 920 (Pa. 1995).

683. Allocatur is defined as a "word . . . used to denote that a writ or order was allowed." BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

684. *Zettlemoyer*, 657 A.2d at 923.

685. *Id.*

686. *Id.* at 924.

687. *Id.* at 924-25. *See* Lease v. Doll, 403 A.2d 558 (Pa. 1979) (holding that when the width of an easement is not specified in an agreement, the width will be determined by what is suitable and convenient for the use of free passage).

688. *Zettlemoyer*, 657 A.2d at 924.

689. *Id.* at 925. The court stated: "We find that the clear language of the agreement is evidence of the original intent of the parties to allow Transco to clear additional land where such clearing is reasonably necessary to achieve the purpose of the agreement." *Id.*

690. *Id.*

agreement, use and acquiescence does not determine width when an agreement is ambiguous.[691]

The court concluded that when an easement is ambiguous, as in *Zettlemoyer,* the grantee shall have use of the right-of-way that is reasonable and necessary to fulfill the intent of the original agreement.[692] In so concluding, the supreme court reversed the decision of the commonwealth court and reinstated the order of the court of common pleas.[693]

The supreme court's decision in *Zettlemoyer* clarifies the standard to be utilized in determining width in an ambiguous easement. The holding does not give grantees full license to exploit an easement, but rather, limits grantees to the necessary and reasonable use of the easement.

691. *Id.*
692. *Id.* at 926.
693. *Zettlemoyer*, 657 A.2d at 927.